No. 299

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

GEORGE A. LANDELL, Executor of E. A. Landell, deceased, ROBERT W. LISHMAN, Trustee for Margaret H. Fearon and Elinor H. Lishman, and PAUL FREEMAN, ROBERT W. LISHMAN, ROBERT F. WELSH, not individually but solely as Committee of Minority Stockholders of the Northern Pacific Railroad Company, a Federal Corporation Organized and Existing under the Act of July 2, 1864 (13 Stat. 365), *Petitioners*,

v.

NORTHERN PACIFIC RAILWAY COMPANY, formerly known as the SUPERIOR AND ST. CROIX RAILWAY COMPANY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

HENRY H. FOWLER,
ALEXANDER B. HAWES,
ROBERT W. LISHMAN,
MARK LEVA,
EDWARD BROWN WILLIAMS,
Attorneys for Petitioners.

FOWLER, LEVA, HAWES
& SYMINGTON,
Of Counsel.

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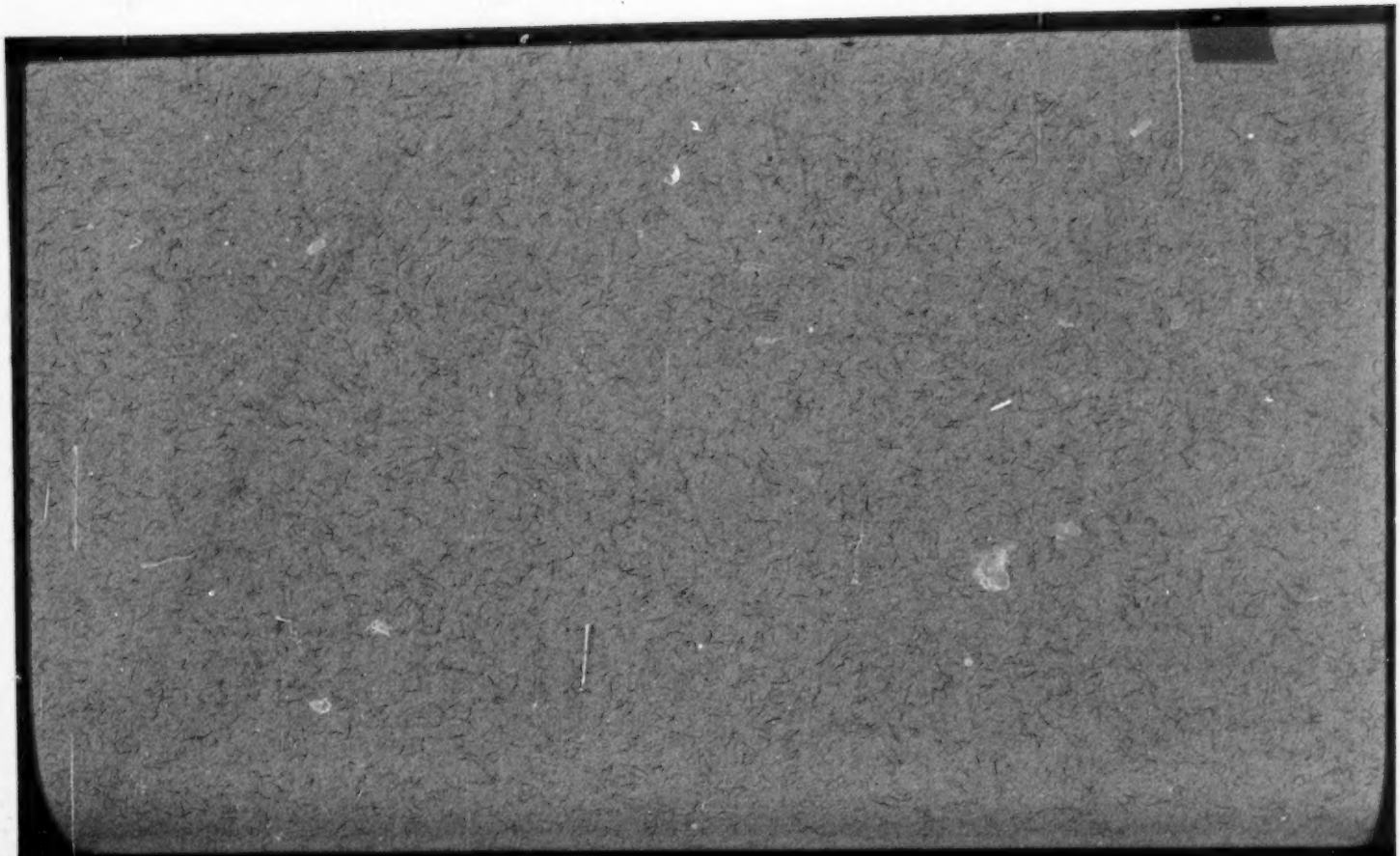

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NORTHERN PACIFIC RAILWAY COMPANY, formerly known as the SUPERIOR AND ST. CROIX RAILWAY COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

George A. Landell, Executor of E. A. Landell, deceased, Robert W. Lishman, Trustee for Margaret H. Fearon and Elinor H. Lishman, and Paul Freeman, Robert W. Lishman, Robert F. Welsh, not individually but solely as Committee of Minority Stockholders

of the Northern Pacific Railroad Company, a federal corporation organized and existing under the Act of July 2, 1864 (13 Stat. 365), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on April 14, 1955, affirming a judgment of the United States District Court for the District of Columbia.

OPINIONS BELOW.

The opinion of the United States District Court for the District of Columbia per McLaughlin, J., denying Respondent's first motion to dismiss (R. 135) is reported in 98 F. Supp. 479 (1951). The opinion of the same court, per Tamm, J., granting Respondent's second motion to dismiss (R. 123) is reported in 122 F. Supp. 253 (1954). The per curiam opinion of the United States Court of Appeals for the District of Columbia Circuit, is not yet reported. All three opinions are printed in Appendix A, hereto.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on April 14, 1955. (R. 559.) Rehearing was denied on May 11, 1955. (R. 590.) The rehearing denial order was amended on May 25, 1955. (R. 591.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Did the courts below err in holding laches to be a bar to Petitioners' cause of action under circumstances where:

   a. The cause of action is founded upon a violation of a statute establishing a statutory con-

tract and expressing an important public policy?

b. The cause of action is founded upon error in a judicial decision induced by a fraud on the court?

c. There has been no lack of diligence on the part of Petitioners?

d. There has been no inexcusable delay on the part of Petitioners?

e. Respondent has not suffered any damage or prejudice because of lack of diligence or because of inexcusable delay in instituting suit?

2. Even though laches may bar recovery for past damage, did the courts below err in refusing to protect Petitioners' existing and continuing rights under the Act of July 2, 1864, in the railroad and telegraph franchises and right of way, which, in any event, Respondent was not competent to acquire?

3. Did the courts below err in using, and approving the use of, summary judgment procedure to determine a complicated case involving important public issues?

STATUTES AND RULE INVOLVED.

The statutory provisions involved are the Act of July 2, 1864, 13 Stat. 365; the Joint Resolution of May 31, 1870, 16 Stat. 370; a proviso in the Act of July 1, 1898, 30 Stat. 597, 620; Section 4 of the Act of June 25, 1929, 46 Stat. 41; Revised Statutes of Wisconsin 1878, sec. 1833, as amended by Ch. 260, 1880, Ch. 268, 1882, Ch. 293, 1883. The rule involved is Rule 56 of the Federal Rules of Civil Procedure. The texts of these statutory provisions and rule are printed in Appendix B, *infra,* pp. 20a-39a.

STATEMENT.

Nature of Proceeding and Present Status.

Petitioners are holders of a minority of the stock (about 30,000 shares or 3%) of the Northern Pacific Railroad Company, an existing federal corporation (herein sometimes called "Railroad"), created by Act of Congress of July 2, 1864. Respondent Northern Pacific Railway Company, a Wisconsin corporation (herein sometimes called "Railway"), claims to be successor to Railroad and holds a majority of the stock (about 97%) of Railroad.

Petitioners seek a judgment (1) that the decrees of foreclosure and sale of Railroad's property entered by the United States Circuit Court for the Eastern District of Wisconsin under which Respondent claims such successorship are null and void, (2) that Respondent has no title to Railroad's franchise, railroad, or right of way, (3) that Respondent account for Railroad's property and profits realized therefrom, and (4) that Railroad has received such property and profits in trust for Petitioners.

Petitioners brought this action in the District Court for the District of Columbia on December 20, 1950, invoking the jurisdiction of that court, under 28 U. S. C., section 133, on the ground that the action arose under the Constitution and laws of the United States (Constitution, Article I, Sections 1 and 8, Clauses 1, 3, 7, 9, and 18; Article III, Sections 1 and 2; Article IV, Section 3, Clause 2; and Amendment V; Act of July 2, 1864 [13 Stat. 365] and Joint Resolution of May 31, 1870 [16 Stat. 370]). The general equity jurisdiction of the District Court was also invoked under 11 D. C. Code, Sections 301 and 305, as amended.

Respondent first moved the District Court to dismiss for (a) improper venue, (b) lack of service, and (c) forum non conveniens. The court, per McLaughlin, J., overruled this motion. (R. 135; Appendix A, p. 1a.)

Thereafter, Respondent moved for summary judgment in the District Court upon the ground that relief for Petitioners was barred by laches and the statute of limitations. (R. 271.) The court, per Tamm, J., granted the motion for summary judgment, basing its action upon its view that Petitioners were guilty of laches. (R. 123; Appendix A, p. 8a.)

On appeal, the Court of Appeals affirmed, per curiam, the summary judgment of the District Court on the basis of Judge Tamm's opinion. (R. 558; Appendix A, p. 18a.)

Summary of Facts.

Railroad was incorporated by Act of Congress of July 2, 1864 (13 Stat. 365; R. 198; see Appendix B, p. 20a).

By Section 1, the corporation was granted a franchise to construct and enjoy a continuous railroad and telegraph line from Lake Superior to Puget Sound. Section 2 granted a right of way for this purpose, exempt from taxation. In aid of construction Section 3 of the Act also granted approximately 43,000,000 acres of public land.

The national character of the railroad was indicated by the provisions of Section 11, under which the railroad was made "a post route and a military road, subject to the use of the United States, for postal, military, naval and all other governmental services." Section 3

also referred to the purpose "to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway." The concept of this particular railroad as a national highway was fully recognized and expounded by this Court in *Roberts* v. *Northern Pacific Railroad Co.*, 158 U. S. 1 (1895).

Section 10 of the Act provided that "all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company . . ." and other provisions spelled out in detail the mechanics of opening the books to receive stock subscriptions. Section 10 further provided that "no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, *except by the consent of the congress of the United States.*" (Emphasis supplied.)

By Joint Resolution of May 31, 1870 (16 Stat. 370; R. 213; see Appendix B, p. 33a) Congress authorized Railroad "to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation . . ."

On July 1, 1870, the mortgage authorized by the Joint Resolution of 1870 was placed upon Railroad's property to secure an issue of bonds. This mortgage was extinguished in 1875. Sometime thereafter there occurred a series of events which resulted in what the Petitioners respectfully submit was an illegal transfer to Respondent of Railroad's property, including franchises, main line, and right of way. (R. 15-17.)

In 1893 a creditors' suit against Railroad and a foreclosure suit by the trustee of three junior mortgages were brought in the United States Circuit Court for the Eastern District of Wisconsin. These were the last three of a series of six mortgages placed upon Railroad's property in 1879, 1881, 1883, 1887, and 1889, without the consent of Congress. A reorganization plan, dated March 16, 1896, eventually was accepted by the bondholders and the holders of a majority of Railroad's stock (not including the stock held by Petitioners). Railroad then filed an answer admitting all the allegations of the bill. Thereupon, consent decrees of foreclosure of the three junior mortgages were entered which purported to authorize sales of the bulk of the property of the Railroad. (R. 18-20.)

However, and this is important for this case, the decree of foreclosure and sale dated April 27, 1896, specifically reserved, with respect to the railroad itself, the railroad and telegraph franchises, and the right of way, the question of the validity of the mortgages being foreclosed. (R. 20, 21, 22.)

On July 25, 1896, and the next few days thereafter property covered by the three junior mortgages was sold to Respondent at foreclosure sales pursuant to the decrees of April 27 and 28, 1896. (R. 26.) Subsequently in 1899 approximately 4,000,000 acres of lands and rights to lands in North Dakota and Minnesota, east of the Missouri River, were also sold to Respondent pursuant to sequestration decrees made by the United States Circuit Court for the Eastern District of Wisconsin. (R. 27, 38.)

In its petitions for orders confirming these sales, Respondent falsely and fraudulently represented to the court that it was competent to receive and own the property purchased, despite a Wisconsin law forbid-

ding acquisition of another railroad line under the circumstances of Railway's case, and despite the applicable laws of six states through which the railroad ran making it illegal for Respondent to hold land not used in railroad operations. At the same time, Respondent falsely and fraudulently represented to the court that it was an independent purchaser. In fact, Respondent from 1873 and up to 1896, was owned and controlled by the Northern Pacific Railroad Company, the federal corporation (R. 42, 44, 58-60, 158).

The order of July 27, 1896, confirming the sale of July 25, 1896, was made subject to the reservation as to the validity of the mortgages set out above, as were the several deeds conveying the railroad, franchises and right of way to Respondent. (R. 20, 22.)

Neither the Circuit Court nor any other court, at that time or since, has ever decided the question thus reserved concerning the validity of the transfer of the railroad, franchises, and right of way. (R. 21.)

The question of the validity of the transfer of lands by the foreclosure sales of 1896 has also been expressly reserved by subsequent Acts of Congress. (R. 35.) The Act of July 1, 1898, 30 Stat. 597, 620, contains this proviso:

> "*And provided, further,* That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway

Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act, * * * ." (See Appendix B, p. 36a.)

Railroad still exists as a federal corporation, holding annual meetings regularly. Petitioners still receive notices of each meetings.

Petitioner Committee of Minority Stockholders of the Northern Pacific Railroad Company was duly established by agreement of October 1, 1906. It represents 852 shares of preferred and 28,278 shares of common stock in Railroad. These shares have been uninterruptedly on deposit with the Fidelity Trust Co. of Philadelphia since the early 1900's pursuant to the agreement establishing the Committee, copy of which is annexed to the complaint. (R. 3, 4.)

Prior to the formal establishment of the Committee and also subsequent thereto and continuing after the filing of this proceeding in December, 1950, the minority stockholders of Railroad have vigorously and continuously, beginning March 16, 1896, asserted, at meetings of stockholders of the federal corporation and in various other ways as set forth in the complaint herein and as set forth also in this petition and brief, the invalidity of the reorganization proceedings and decrees and the use by Respondent of the property and franchises of said corporation. Through the Committee and otherwise, the minority stockholders represented by the Committee have attempted to vindicate their rights through the appropriate officials of the United States Departments of Justice and Interior, and before the Congress of the United States, which created the rights which Petitioners are entitled to enjoy. (R. 4, 66, 69, 129.) In 1938, an attempt on behalf of certain

of the minority stockholders to intervene in a suit brought by the United States was denied, but the District Court's order denying the petition specifically reserved the rights of the attempted interveners to assert their claims in other proceedings (R. 70; see summary of this litigation in *United States* v. *Northern Pac. Ry. Co.*, 41 F. Supp. 273, 281-283 (D. Wash. 1941)); and this order was affirmed by the Circuit Court of Appeals.[1] Subsequent proceedings in connection with this litigation in this Court did not in any way impair this reservation.[2]

Respondent has not acted in reliance on the action or inaction of Petitioners in such a way as to preclude the return of the property, right of way, and franchises to Railroad. (R. 569.) In fact, Respondent has acted so as to facilitate such a return if it should become necessary. It has kept Railroad in existence. In each of five mortgages executed by Respondent since 1896 purporting to cover the franchises, right of way and other property and rights to property of Railroad, Respondent has inserted provisions authorizing it, without the consent of the mortgage trustees, to convey and transfer to a railroad corporation organized and existing under the laws of the United States all the property purported to be covered by the mortgage, subject to the continuing lien of the indenture. (R. 42, 43.)

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[1] *Schmidt* v. *United States*, 102 F. (2d) 589 (C. C. A. 9th, 1939).

[2] *Northern Pacific Railroad Co.* v. *United States*, 304 U. S. 545 (1938); *Schmidt* v. *United States*, 304 U. S. 545 (1938); *Northern Pacific R. R. Co. by Schmidt* v. *United States*, 308 U. S. 508 (1939); *Ex Parte Northern Pacific R. R. Co.*, 308 U. S. 508 (1939); *United States* v. *Northern Pacific Railway Co.*, 309 U. S. 626 (1940); *United States* v. *Northern Pacific Railway Co.*, 311 U. S.

REASONS FOR GRANTING THE WRIT.

The decisions of the District Court and Court of Appeals are in conflict with the decisions of this Court or of other federal courts.

I. They are in conflict with decisions of this Court or of other federal courts in permitting the defense of laches to apply, although:

(A) The cause of action is founded upon a violation of a statute establishing a statutory contract or expressing an important public policy.

Oregon & California Railroad Co. v. *United States,* 238 U. S. 393 (1915), 243 U. S. 549 (1917).

Southern Oregon Co. v. *United States,* 241 Fed. 16 (C. C. A. 9th, 1917); remanded on joint motion, 249 U. S. 589 (1919).

Ewert v. *Bluejacket,* 259 U. S. 129 (1922).

(B) The cause of action is founded upon error in a judicial decision induced by a fraud on the court.

Hazel-Atlas Glass Co. v. *Hartford-Empire Co.,* 322 U. S. 238 (1944), reh. den. 322 U. S. 772 (1944).

Stoddard v. *Chambers,* 43 U. S. 284 (1844).

Johnson v. *Waters,* 111 U. S. 640 (1884).

Root Refining Co. v. *Universal Oil Products Co.,* 169 F. (2d) 514 (C. C. A. 3d, 1948), cert. den. 335 U. S. 912 (1949), reh. den., 336 U. S. 915 (1949).

(C) There has been no lack of diligence.

Southern Pacific Company v. *Bogert,* 250 U. S. 483, 488-490 (1919).

Shaffer v. *Rector Well Equipment Co.,* 155 F. (2d) 344, 345-347 (C. C. A. 5th, 1946).

(D) There has been no inexcusable delay in instituting suit.

Southern Pacific Company v. *Bogert,* 250 U. S. 483, 488-490 (1919).

Shaffer v. *Rector Well Equipment Co.,* 155 F. (2d) 344, 346-347 (C. C. A. 5th, 1946).

(E) In any event, Respondent has not suffered any damage or prejudice because of lack of diligence or because of inexcusable delay in instituting suit.

Shaffer v. *Rector Well Equipment Co.,* 155 F. (2d) 344, 346-347 (C. C. A. 5th, 1946).

Northern Pac. Ry. Co. v. *Boyd,* 177 Fed. 804 (C. C. A. 9th, 1910), aff'd, 228 U. S. 482 (1913).

II. Even though laches may bar recovery for past damage, the decisions below are in conflict with decisions of this Court and other federal courts in refusing to declare illegal present and future violations of Petitioners' existing and continuing rights in the railroad and telegraph franchises and right of way, which, in any event, Respondent was not competent to acquire.

Pennsylvania R. R. Co. v. *St. Louis, etc. R. R. Co.,* 118 U. S. 290 (1886).

Central Transportation Co. v. *Pullman's Palace Car Co.,* 139 U. S. 24 (1891).

Great Northern Railway Co. v. *Steinke,* 261 U. S. 119 (1923).

Menendez v. *Holt,* 128 U. S. 514 (1888).

Hanover Star Milling Co. v. *Metcalf,* 240 U. S. 403 (1916).

Shaffer v. *Rector Well Equipment Co.,* 155 F. (2d) 344 (C. C. A. 5th, 1946).

III. The decisions below are in conflict with decisions of this Court and other federal courts in using summary judgment procedure to determine a complicated case involving important public issues, thereby effectively denying Petitioners an opportunity to establish the validity of their case.

Arenas v. *U. S.*, 322 U. S. 419 (1944).

Eccles v. *Peoples Bank of Lakewood Village, Cal.*, 333 U. S. 426 (1948).

Kennedy v. *Silas Mason Co.*, 334 U. S. 249 (1948).

Palmer v. *Chamberlin*, 191 F. (2d) 532 (C. C. A. 5th, 1951).

The importance of the errors below is already indicated by the foregoing statement.

In this case, the decisions below, if allowed to stand, will permit the abrogation of a statutory contract. They will defeat an important public policy, the policy of maintaining strict supervision by Congress over the financing of a publicly sponsored national railroad. They will condone a fraud upon the United States Circuit Court for the Eastern District of Wisconsin. They will extinguish important existing, continuing rights of property granted by Act of Congress. They will do this through the grant of a summary judgment despite the existence of complicated, important public issues.

They will also constitute precedents for similar decisions in the future.

Finally they represent, both in the application of the defense of laches and in the use of summary judg-

ment, a departure from the accepted and usual course of judicial proceedings.

The importance of the errors referred to above, both in terms of this case and as precedents for the future, their departure from the accepted and usual course of judicial proceeding, and the conflict between these decisions and decisions of this Court and of other federal courts, all call for the exercise by this Court of its supervisory authority to issue a writ of certiorari to the Court of Appeals.

ARGUMENT.

I. THE COURTS BELOW ERRED IN HOLDING LACHES TO BE A BAR TO PETITIONERS' CAUSE OF ACTION CONTRARY TO APPLICABLE DECISIONS WHICH ESTABLISH THAT (A) LACHES CANNOT DEFEAT A CAUSE OF ACTION FOUNDED UPON A VIOLATION OF A STATUTE ESTABLISHING A STATUTORY CONTRACT OR EXPRESSING AN IMPORTANT PUBLIC POLICY, (B) LACHES CANNOT DEFEAT A CAUSE OF ACTION FOUNDED UPON ERROR IN A JUDICIAL DECISION INDUCED BY A FRAUD ON THE COURT, AND (C) LACHES IS NOT PRESENT UNDER SUCH CIRCUMSTANCES AS EXIST IN THIS CASE.

A.

The doctrine of laches cannot defeat a cause of action founded upon a violation of a statute establishing a statutory contract or expressing an important public policy.

The defense of laches is not permitted to sanction such a violation. Acts in violation of such statutes are void, and delay, of no matter what duration, will not lend them validity.

In *Oregon & California Railroad Co.* v. *United States,* 238 U. S. 393 (1915), 243 U. S. 549 (1917), the Court held that railroad grants had the command and effect of law. In that case defendant advanced the defense of laches, limitations, waiver, acquiescence, and estoppel, but the Court held that none of these defenses was available because the property had been acquired in violation of statute. In making this determination, the Court said, 238 U. S., at 427:

"We may observe again that the acts of Congress are laws as well as grants, and have the constancy of laws as well as their command, and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company based on waiver, acquiescence, and estoppel, and even to the defenses of laches and the statute of limitations. The laws which are urged as giving such defenses and as taking away or modifying the remedies under review have no application . . ."

See 238 U. S., at 435; also 243 U. S., at 561.

In the same case private individuals were, however, denied recovery against the railroad—not because of the defense of laches—but because the Court held the vagueness of the statute there involved precluded the existence of a trust in their favor. 238 U. S., at 434.

In *Southern Oregon Co.* v. *United States,* 241 Fed. 16 (C. C. A. 9th, 1917), the Circuit Court of Appeals had before it a case in which the grantee of public lands and its successors had violated the statutory requirements that the lands must be sold in small tracts at not more than $2.50 per acre. The statute also provided that lands unused to aid in the building of a military road reverted to the United States if the road was not built within five years from the date of the grant. The United States, forty-three years after the statutory violation had commenced, instituted suit to forfeit title to 96,000 acres on the ground of breach of conditions[1] by defendant's predecessors in title. The

[1] In the case of violation of a franchise grant even the passage of 156 years was held no bar to an action by members of a body politic and corporate seeking to compel statutory compliance by the grantee's successor. *Inhabitants of Stoughton* v. *Baker,* 4 Mass. 522 (1809).

court held that the decree below, granting such forfeiture relief, should be upheld and that defendant should account. In doing so the court considered and overruled defenses almost identical with those now urged by Respondent in the present case.

Where, also, a statute expresses an important public policy, an act in violation of the statute is void, and the defense of laches is inapplicable.

Thus, a conveyance in violation of laws made to guard Indians from the overreaching influence of federal officials assigned to protect them is a nullity, and, in spite of a delay of nine years, laches constitutes no defense to a suit to set it aside. *Ewert* v. *Bluejacket*, 259 U. S. 129 (1922).

The Act of July 2, 1864, incorporating the Northern Pacific Railroad Company, established a statutory contract and expressed an important public policy.

The policy was, in general terms, that the Northwest should be opened up by means of a railroad, 2500 miles in length, with the support and under the supervision of the national government.[1] The Act established the Railroad as a federal corporation, specified the method of its financing, established the terms and authority of its management, and reserved the power to amend the charter from time to time. In addition it granted the Railroad the necessary right of way and large tracts of land from the public domain to assist in the construction of the road.

The particular feature of the contract established by the Act and the policy it expressed which is relevant

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[1] The national character of the road and of the grantee corporation is emphasized in *Roberts* v. *Northern Pacific Railroad Co.*, 158 U. S. 1, 20, 21 (1895).

in this case was the proposal that the Railroad be financed by and belong to the American public. Thus, the stock of the Company was to consist of one million shares of $100 par value, and the Company was required to open its stock books to public subscription in specified cities throughout the country.

By this provision, Congress in effect invited the American public to finance the national railroad, and it assumed a responsibility for the protection of those who responded to the invitation. This responsibility it proposed to discharge by such safeguards as the provisions in the Act regulating the management of the company, reserving the right to amend the charter, and, in particular, prohibiting the placing of a mortgage on the road except with the consent of Congress.

These features of the Act distinguish this case from that of the individuals involved in the *Oregon & California Railroad Co.* case, 238 U. S. 393 (1915), 243 U. S. 549 (1917), discussed above. Here, the stockholders are a readily identifiable group of persons, and the provisions cited clearly make them beneficiaries to whom, as well as to the granting sovereignty, compliance with the statute is owed.

Consent to the placing of a mortgage on the road was given by a Congressional resolution in 1870. (16 Stat. 370, Appendix B, p. 34a.) This resolution resulted from the inability of the company to secure adequate financing by means of stock subscription. Though the 1870 resolution was couched in general terms, it was designed to permit a particular issue of bonds, which were, as a matter of fact, issued beginning July 1, 1870, immediately following adoption of the resolution. (R. 16.)

A reading of the text of the resolution is sufficient to show that it was intended to authorize only the one

mortgage which was placed on Railroad's property at that time. Throughout the resolution the term mortgage is used repeatedly in the singular and never otherwise. The references are to "said mortgage", "the mortgage by this act authorized", "the mortgage hereby authorized", and "such mortgage".

The language of the Joint Resolution is clear on its face. If, nevertheless, resort is had to its legislative history, the conclusion stated above is confirmed. There were no written Committee reports on the resolution. But the Congressional Globe, in describing the resolution, referred to the mortgage authorized by it in the singular, and the Committee Chairman who reported the resolution on the floors of the Senate and House always and repeatedly referred to the mortgage authorized by the resolution in the singular. So did the opponents of the legislation. Excerpts from the debates to this effect are printed in Appendix C (p. 41a) to this petition. (See also R. 16.)

The consent given by the resolution was therefore exhausted by the issuance of the mortgage bonds in 1870.[1] These were cancelled, as a result of a fore-

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[1] *Cf. East Tennessee, Virginia & Georgia Railway Co.* v. *Frazier*, 139 U. S. 288 (1891). In this connection, it should be noted that a different view was taken by the Circuit Court for the Southern District of New York in *DuPont* v. *Northern Pac. R. Co.*, 18 Fed. 467 (1883), where the court refused, at the suit of a stockholder, to enjoin the issuance of a series of mortgage bonds subsequent to the issue of 1870. Its reasoning has not been adopted by any other court, however. Even in the reorganization proceedings of 1896, the Circuit Court felt it necessary, at the petition of the Wisconsin Central Company, to reserve the question of validity of the mortgage so far as the railroad, the franchises and the right of way were concerned. This reservation was repeated in all the documents of transfer at that time. (R. 22.)

closure of the mortgages, in 1875. No further consent has ever been given by Congress to the creation of a mortgage on the road.

Nevertheless, beginning in 1875, six additional mortgages were placed on the road up to the time of the reorganization of 1896. (R. 18, 19.) And it is on the basis of the foreclosure of three of these mortgages that the Circuit Court ordered the sale of the franchise, right of way, and other property, which resulted in their purported acquisition by Respondent. (R. 19-21; see R. 26, 27.)

These mortgages, having been created without the consent of Congress, were void since they were in violation of Section 10 of the Act of July 2, 1864, which, as has been indicated, was an important feature of a statutory contract, and itself expressed an important public policy.

The purported foreclosure of these void mortgages, involving, as they did, a violation of the statute, was void and could not pass title to a purchaser at foreclosure sale.

As in the *Bluejacket* and other cases cited, alleged laches, therefore, constitutes no defense to a suit to set aside the purported conveyance and to restore the legal title to the Railroad Company.

The purported transfer of the franchise, right of way, and other property to Respondent by sale at foreclosure not only was void, as in violation of statute, but it represented an attempted exercise by the Circuit Court of power clearly reserved to the Congress. (R. 33, 36, 38.)

The Railroad Company was a creature of federal legislation. It was endowed with property by Con-

gressional grant. Congress intended to keep a close supervisory control over the financing, management, and operation of the road, through its reserved power to amend the Act of 1864, and its power over the creation of mortgages.[1] Thus, it refused in 1896, immediately prior to the reorganization, to sanction the transfer of the Railroad's property to Respondent. (R. 35, 183-185, 215-236.)

The effect of the Circuit Court's decree of foreclosure was to abrogate a federal statute and thus the Congressional control which was established by it for the purpose, among other things, of protecting those who invested in the nationally sponsored railroad. It abrogated this control by vesting the railroad property in a corporation which was the creature of the State of Wisconsin, subject to no direct control by Congress.[2]

Both in this case and as a possible precedent in other cases, therefore, the erroneous decisions below are of

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[1] See *The Central Pacific Railroad Co.* v. *Gallatin*, 99 U. S. 727 (1879); *The Union Pacific Railroad Co.* v. *United States*, 99 U. S. 700 (1879).

[2] The fact that the United States Government has not seen fit to move to set aside the invalid transfer apparently reflects an opinion by some representatives of the Executive Branch of the Government, whether or not correct, that the Government's interest has not been seriously affected thereby. Use of the railroad facilities for governmental purposes, regulation of its rates, and regulation of its financing can be assured by general legislation. Application of price restrictions on sales of certain of the lands granted has been made effective against Respondent in the *Land Grant* case. (*United States* v. *Northern Pacific Railway Co.*, 311 U. S. 613 (1940)). On the other hand, however, the rights of Petitioners have been seriously prejudiced by the invalid transfers, indeed, if the decisions below stand, have been for all practical purposes extinguished.

major importance, since they permit the abrogation of a statutory contract, the defeat of an important public policy, and the usurpation of legislative authority by a court.[1]

B.

The doctrine of laches cannot defeat a cause of action founded upon error in a judicial decision induced by a fraud on the court.

Even if the mortgages foreclosed in 1896 had been authorized by the Resolution of 1870, the foreclosure sales to Respondent would have been void for a separate reason, namely, that they were the result of frauds upon the court which decreed such sales, and, accordingly, the alleged laches of Petitioners will not

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[1] In its brief in the Court of Appeals, pages 43, 44, Respondent sought to maintain the remarkable contention that the question whether the transaction complained of is void or merely voidable is irrelevant to the applicability of the doctrines of laches. For this contention it relied principally upon the case of *Comm'rs. of Leavenworth County* v. *Chicago, R. I. & P. Ry. Co.*, 18 Fed. 209 (W. D. Mo. 1883). It quoted from the lower court's decision to indicate that a court will not inquire as to whether the transaction is void, if complainant has been guilty of laches. It failed to indicate that when that case reached this Court, the Court took the opposite view, determining that the transaction was valid, never reaching the question of laches. *Leavenworth County* v. *Chicago, R. I. & P. Ry. Co.*, 134 U. S. 688 (1890). Indeed, this Court said in that case, "These conclusions make it unnecessary to consider the defenses of the statute of limitations and of laches . . .", 134 U. S., at 710. The cases cited on page 44 of Respondent's brief in the Court of Appeals are inapplicable because of the action of this Court in the *Leavenworth* case. Moreover, none of them involved procurement of a judgment by fraud upon a court or the present and continuing violation of an operative statute. See *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. (2d) 514 (C. C. A. 3d, 1948), cert. den., 335 U. S. 912 (1949), reh. den. 336 U. S. 915 (1949); *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238 (1944), reh. den. 322 U. S. 772.

prevent appropriate judicial action to declare such sales void.

The frauds upon the court referred to are the frauds of misrepresentation to the United States Circuit Court for the Eastern District of Wisconsin of two facts concerning Respondent, on the occasion of the foreclosure sales:

(1) Misrepresentation that Respondent was legally competent to receive the railroad and lands of Railroad; and

(2) Misrepresentation that Respondent was an independent purchaser.[1]

As this Court said in *Stoddard* v. *Chambers,* 43 U. S. 284 (1844), at 318, "Fraud vitiates all transactions. It makes void a judgment, which is a much more solemn act than the issuing of a (land) patent."

Fraud in the obtaining of a judgment is a basis for reopening the judgment at any time. Nor will delay by private litigants in bringing such a situation to the attention of the courts prevent the courts from taking action. More is at issue than merely the rights of the litigants. The public concern in the integrity of the administration of justice is involved.

See *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.,* 322 U. S. 238, 246 (1944).

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[1] These, together with fraud in the misrepresentation of the value of Railroad's property to the same court, and fraud in the misrepresentation to Railroad stockholders of the nature and effect of various judicial decisions constitute the only frauds of Respondent alleged in the complaint. (R. 42, 44, 58-62, 69, 70-73) Because of the nature of these frauds, directed, as they were, at the Circuit Court and affecting its action, the mere circumstance that they have been open and known or discoverable does not permit laches to apply.

In *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. (2d) 514 (C. C. A. 3d, 1948) at 522, the Circuit Court of Appeals for the Third Circuit said,

> "The matter is not one of merely private concern subject to the action or inaction of the litigants, but is one of vast public importance, so that *it becomes immaterial that the injured party may have been derelict in bringing the fault to the Court's attention.*" (Emphasis supplied.)

Relief against such fraud is not restricted to the court in which the fraud is practiced. If a court finds that a decree or judgment, even though made by another court, was obtained by fraud, it will deprive the guilty party of any benefit derived by him thereunder. *Johnson* v. *Waters*, 111 U. S. 640 (1884).

In the *Johnson* case, the Court held that the United States Circuit Court had jurisdiction to set aside a decree of a state court because of fraud in the obtaining thereof. After stating the general rule concerning the finality of judgments, the Court, in 111 U. S., at 667, stated:

> "... But this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud. *The Court of Chancery is always open to hear complaints against it, whether committed in pais, or in or by means of judicial proceedings.* In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; *but it will scrutinize the*

conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it." (Citing authorities.) (Emphasis supplied.)

Nor is standing to seek relief against such fraud restricted to a party to the proceeding in which the fraud was practiced. Thus in *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. (2d) 514 (C. C. A. 3d, 1948), the remedy for the fraud was sought and obtained at the instance of applicants, who had not been parties to the fraud-tainted proceeding, but against whom the decision in the proceeding was being used as a precedent.

Railway, as a Wisconsin railroad corporation, was prohibited by Wisconsin law in 1896 from acquiring any part of any other railroad unless the respective railroads could be lawfully connected to constitute one continuous line. Wisconsin Revised Statutes, (Appendix B, p. 36a.) Railway, prior to the foreclosure sales, had no railroad, and therefore none which could be connected with that of Railroad to form a "continuous line". Twelve days before the purchase at foreclosure, as set forth in a statement dated July 13, 1896, and sworn to by a majority of its board of directors for filing in the State of Montana, Railway had no assets except $4100 in cash, stocks, bonds and securities of Northern Pacific Railroad Company. (R. 7, 174, 196, See 236.)

Railway was also prohibited by the applicable laws of six states at the time of the foreclosure sales in 1896 (and also in 1899 when lands in Minnesota and North

Dakota were sold) from owning, holding, or using lands in such states not necessary for railroad operation purposes.

Wisconsin: Statutes 1889, sec. 1828.
Minnesota: Statutes 1894, sec. 5877.
North Dakota: Revised Codes 1895, sec. 2497.
Montana: Codes 1895—Title VIII, sec. 894.
Idaho: Revised Statutes 1887, sec. 2666.
Oregon: Hill's Annotated Codes and Laws 1887, Vol. 2, sec. 3321.

Yet, at the same time, in the petitions filed by Respondent with the Circuit Court for decrees confirming the sales to Respondent, as disclosed in the court's decree dated July 27, 1896, (confirming the sale of the railroad, franchise, and right of way), in the court's decree dated August 8, 1896 (confirming sales of lands in the land grant, except lands east of the Missouri), and in the court's decree dated September 16, 1899 (confirming sales of land in the land grant in Minnesota and North Dakota), Respondent falsely and fraudulently alleged that it had complied with all the requirements of law of the States of Wisconsin, Minnesota, North Dakota, Montana, Idaho, and Oregon so as to enable it to transact business and to hold property, real and personal, in each such state.[1]

These allegations were false and fraudulent as to acquisition of connecting railroad in Wisconsin and as to the acquisition of the federal land grant in all of those states.

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[1] The texts of the decrees referred to are given in hearings before the Joint Congressional Committee for the Investigation of the Northern Pacific Railroad Company Land Grants, 68th Congress (hereafter called "JCC Hearings") at pp. 1431, 1439, 1479.

Furthermore, paragraph VII of Petitioners' complaint (R. 6-11) alleges that on or about July 13, 1896 (which was 12 days before the sale at foreclosure) Respondent acquired "most of the bonds and more than 90% of the capital stock of the Northern Pacific Railroad Company." This allegation must, for the purposes of Respondent's motion for summary judgment, be taken as true. Moreover, it is not denied, but rather confirmed, by paragraph VII of Respondent's answer. (R. 81-88.) At the date of the sales in 1896, therefore, Respondent purchaser completely dominated the Railroad seller. The sales were, in effect, transactions between Respondent and itself. (R. 10, 42, 60.)

Respondent, however, represented itself to the Circuit Court as an "independent" purchaser. (Complaint LVI, R. 41, 42.)

The fraud on the Circuit Court involved in the false allegations of Respondent as to competency to acquire the railroad, its competency to acquire the lands, and its status as an independent purchaser, of Railroad, related to material facts and affected the action of the court.

Obviously the court would not have confirmed sales to an entity which it knew was not competent to own the property purchased. And obviously the court, in view of the absence of an independent appraisal, would have undertaken to examine independently and with care the fairness of the terms of the foreclosure sales if it had known that the purchaser was not a bona fide independent entity. *First National Bank of Cincinnati* v. *Flershem*, 290 U. S. 504 (1934).[1]

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[1] In its brief in the Court of Appeals, Respondent attempted to take the position that invalidity of the transaction, whether due to statutory violation or fraud, does not affect the applicability of the doctrine of laches. See p. 27, note 1, above.

C.

Laches is not present under such circumstances as exist in this case in that: (1) There has been no lack of diligence; (2) There has been no inexcusable delay; and (3) In any event, Respondent has not suffered any damage or prejudice because of lack of diligence or because of inexcusable delay in instituting the present case.

The elements necessary to establish laches are familiar. Passage of time by itself does not constitute laches. *Gardner* v. *Panama Railroad,* 342 U. S. 29 (1951). There must have been lack of diligence, inexcusable delay, and damage or prejudice to the Respondent because of such lack of diligence and inexcusable delay. These elements must be proved as matters of fact.

Southern Pacific Co. v. *Bogert,* 250 U. S. 483, 488-490 (1919).
Shaffer v. *Rector Well Equipment Co.,* 155 F. (2d) 344 (C. C. A. 5th, 1946).

1. *There has been no lack of diligence.*

Respondent admits diligence on the part of the Petitioners but contends such diligence has not been exercised before the proper forum. This contention ignores the rule that diligence can be established by proof of the pursuit of remedies other than litigation. When other remedies are continuously sought, failure to institute litigation is no reason to apply the doctrine of laches. *Shaffer* v. *Rector Well Equipment Co.,* 155 F. (2d) 344, 346-347 (C. C. A. 5th, 1946).

Judge Tamm appears to regard as a "novel point" (Appendix A, p. 12a) the contention that Petitioners' continuous pursuit of administrative and legislative remedies establishes that Petitioners have not been guilty of lack of diligence. In view of the fact that Petitioners are parties to a federal statutory contract by invitation of Congress, it would seem that pursuit of such remedies was reasonable and proper and con-

sistent with the rule laid down in the *Shaffer* case, *supra,* that continuous pursuit of non-judicial remedies constitutes diligence. Nevertheless, if Judge Tamm is right in considering that this application of the general rule raises a novel point, this would appear, in itself, to be a matter calling for the decision of this Court and, therefore, one which should require the grant of certiorari.

It would further seem that the decision of what he considered a novel point, which was necessarily involved in Judge Tamm's grant of Respondent's motion, should not have been made upon motion for summary judgment. See p. 50 below.

For more than fifty years Petitioners and their predecessors have protested in various forms the illegality of Respondent's acquisition of the estate of the federal corporation. Such protests have been and are being made at stockholders' meetings, to the Departments of Justice and Interior, Interstate Commerce Commission and Congressional Committees, and elsewhere.

In its Answer (pp. 2-3), Respondent admits the truth of the foregoing statement, and alleges (in part accurately and in part inaccurately) that:

> ". . . plaintiff's claims have been presented to and rejected by the Interior Department of the United States, two Attorneys General, various committees of Congress, and various courts."

In the present case the original opinion of Judge McLaughlin in the District Court recognizes that Petitioners have always persisted in their claim whereas in the *Bogert* case, *supra,* where the plea of laches was overruled, the minority holders had for a time acquiesced in the reorganization plan. This appears in Judge McLaughlin's opinion as follows:

"It would appear that the relief sought by plaintiffs in the instant case is essentially similar to that sought in the Bogert case and that the rule announced in the Bogert case should, a fortiori, apply herein, since in this case plaintiffs, or their predecessors, have always persisted in the claim that the reorganization was invalid and that the transfer of assets to the majority stockholders was illegal, whereas in the Bogert case the minority holders had for a time acquiesced in the reorganization plan." (Appendix A, p. 5a).

2. *There has been no inexcusable delay.*

As pleaded in the complaint (R. 72) Respondent procured a deficiency judgment in its favor against the federal corporation and "advises minority stockholders . . . that their shares . . . are worthless because [the federal corporation] is bankrupt and that defendant holds a judgment against said federal corporation in excess of $100,000,000." Respondent's own fraudulent action in obtaining the deficiency judgment (R. 72) and using it to hinder and prevent the minority from undertaking costly litigation has been one of the largest contributing factors in deterring institution of litigation.

Respondent has also conducted a propaganda campaign to convince the minority stockholders that the foreclosure decrees of the Circuit Court and the decisions of this Court have conclusively adjudicated, and that the Attorney General has ruled, that Respondent is the lawful successor to the franchises and property of the federal corporation. (R. 61, 105, 106, 119, 189, 264; See Respondent's Brief in the Court of Appeals, pp. 5, 12, and 18; Petitioners' Reply Brief in the Court of Appeals, pp. 8-10.)

These actions on the part of Respondent were successful in discouraging financial support for necessarily costly litigation until other avenues of possible relief, administrative and legislative, had been explored and found to be, at least up to the present time, ineffectual.

Having deliberately caused the delay in resort to litigation, Respondent is in no position to complain of that delay.

In upholding the defense of laches, Judge Tamm's opinion (R. 125, 128) relies upon the 1939 unreported opinion and decision of Judge Hulbert in the case of *Joseph Hoover* v. *Northern Pacific Railway Company et al.,* (U. S. D. Ct., So. D. N. Y.) which dismissed the complaint in that case (to which Petitioners were not parties) for inexcusable delay in its prosecution. (R. 165.) The per curiam Court of Appeals opinion in footnote 2 thereof (R. 558) cites the *Hoover* case and states that it was allowed to die for want of prosecution in 1939 and a motion to reinstate it was denied for inexcusable laches.

The facts as admitted are that Hoover was *not,* as pleaded in the Answer (R. 115), a dissenting shareholder in 1896—he was a concurring and participating shareholder. (R. 252.) No decision in a suit on his complaint should, therefore, have any relevance to the present case. *Arnstein* v. *Porter,* 154 F. (2d) 464, 474-5 (C. C. A. 2d, 1948).

The action commenced by Hoover in 1900 abated in 1904 because, it was then known to all parties to the suit that Hoover had no standing as party plaintiff. In 1939 after the Hoover suit had in 1918 been marked off the calendar for failure to answer the call, substitute counsel for the executor of deceased Hoover made

a motion to reinstate the *Hoover* case on the calendar. No reason was offered for the 35 year delay in prosecution except the obviously flimsy one of missing papers. (R. 172.) The attorneys for Hoover's executor in 1939 were at that time attorneys for Petitioner committee herein. They were dismissed before the institution of the present proceeding. (R. 194, 562.)

In 1938-1939 when the motion to reinstate was made and dismissed for inexcusable delay, there was then in possession of both parties to the motion, documentary proof that Hoover had no status to prosecute his action as a dissenter. These documents included a letter from Railway's counsel and an Exhibit offered by Railway at the Hearings before the Joint Congressional Committee to Investigate the Northern Pacific Land Grants. (R. 252, 256.) Neither party to the Hoover suit motion in 1939 disclosed to Judge Hulbert the existence of these material documents then in their possession. If the Judge had known the real reason for the abatement of the Hoover suit in 1904 was because of Hoover's lack of standing as party plaintiff he could not have determined that there had been inexcusable delay in the prosecution of the suit. It was grave error for the courts below, after being fully informed of the circumstances attending the 1939 *Hoover* case opinion,[1] to use it against the Petitioners.

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[1] Point II of Petitioners' Points and Authorities filed in the District Court reads as follows: "The use in the present case of the 1939 decision and opinion in the *Hoover* suit as a determination of inexcusable laches should bar defendant from the aid of a court of equity. Such decision and opinion was obtained by suppression of pertinent evidence on the most material question in that case." See Petitioners' Brief in Court of Appeals, pp. 16, 38; reply brief, pp. 5, 10.

3. *In any event, Respondent has not suffered any damage or prejudice because of lack of diligence or because of inexcusable delay in instituting the present case.*

Respondent must prove not only that it has suffered damage or prejudice, but also that such damage or prejudice was caused by the lack of diligence of Petitioners or their inexcusable delay in instituting litigation. The burden of proof in these respects is on Respondent.

> *Shaffer* v. *Rector Well Equipment Co.*, 155 F. (2d) 344, 346-347 (C. C. A. 5th, 1946).

Respondent will not be prejudiced through the unavailability of witnesses due to the passage of time. This case can be decided upon authenticated documents now in existence and available and upon proof of current happenings. (R. 5.)

The claimed lack of diligence and inexcusable delay in instituting this suit have not lulled Respondent into action prejudicial to itself. Respondent, in an earlier case, has advised the Supreme Court that Petitioners' rights to sue were not and could not be prejudiced by the very judgment Respondent now urges as a bar to Petitioners' relief in this case. (R. 69, 70). Certain of the minority stockholders attempted to intervene in the case of *United States* v. *Northern Pacific Railway Co.*, 311 U. S. 317 (1940) (the "Land Grant case"). Their attempt, as shown in the Lishman Affidavit (R. 190-192), was opposed by the Government, by Railway, and by Railroad on the ground that the attempted intervention was seven years after the commencement of the Government's suit and that the Government's bill of

complaint did not contemplate litigation of claims by stockholders. (R. 191.) The lower courts, in denying the attempted intervention, did so without prejudice and reserved the right in the attempted intervenors to assert their claims in any other proceeding. When these attempted intervenors sought to have the Supreme Court reverse the lower court in *Northern Pacific R. R. Co. by Schmidt* v. *United States,* 308 U. S. 508 (1939) defendants Railway and Railroad filed a joint brief in the Supreme Court stating that the minority stockholders had not been and could not be prejudiced by the judgment denying their right to intervene. The joint brief, at page 4, stated:

> "We repeat here the statement often made in our brief opposing the petition for certiorari, that these parties(the minority stockholders) *have not been and cannot be prejudiced by the judgment entered below.* As shown in their petition for appeal, the order of the District Court denying leave to intervene, affirmed by the Court of Appeals, expressly provides that the contentions of these parties, as minority stockholders of the Northern Pacific Railroad Company, shall be in no way prejudiced by the proceedings and judgment in this case. *Their right to sue as minority stockholders is as good now as it ever was.*" (Emphasis supplied.)

It is a matter of public record that Respondent has conducted its affairs in such a way as to suggest its recognition of the fact that its title to the Northern Pacific Railroad Company properties might ultimately be held to be defective. As has been stated, the foreclosure decrees did not dispose of the issue raised in the proceedings that the mortgages were void, and this issue has not been determined. The conveyances

of record to Respondent all contain specific references to the reservation. (R. 22.)

All of the mortgages placed by Railway on the properties of the federal corporation and filed with the Interstate Commerce Commission under the Interstate Commerce Act (49 U. S. C., Sec. 20a) contain extremely unusual escape clauses. These are provisions authorizing Respondent, without the consent of the mortgage trustees, to convey and transfer to a railroad corporation, organized and existing under the laws of the United States, all the property purported to be covered by the mortgage, subject to the continuing lien of the indenture. (R. 43, 179.)

These provisions show that Respondent has kept itself in a state of readiness to transfer the railroad back to the federal corporation with a minimum of complication. (R. 43, 5, 69.)

Respondent's only showing of damage or prejudice is based on its claim that to permit the minority stockholders to recover would mean depriving it, as holder of 97% of Railroad's stock, of some part of the benefits and advantages derived from its unlawful exploitation of the federal corporation. This is not the kind of damage or prejudice that a court of equity will recognize in applying the doctrine of laches. It is not a change of position induced by reliance upon lack of diligence or inexcusable delay of Petitioners in instituting litigation.

In *Shaffer* v. *Rector Well Equipment Co.*, 155 F. (2d) 344 (C. C. A. 5th, 1946), the defendant had for more than eight years infringed plaintiffs' patents. The plaintiffs had continuously, by means other than litigation, sought to dissuade the defendant from con-

tinuing its patent infringement. In the District Court the defendant was successful in urging that, because of its change in position by reason of enlarging the exploitation of its illegal patent use, the plaintiffs were barred by laches. The Circuit Court of Appeals, however, held that such change of position afforded no reason for the application of the doctrine and reversed. In making such determination the Court of Appeals said, at page 347:

> "* * * the expansion of a business from the profits reaped by infringement is not a prejudicial change of conditions so as to authorize the defending infringer to invoke the defense of laches against a patent owner who has forborne to hale him into Court, meanwhile attempting to settle his claims amicably. Repeated wilful trespasses confer no right to continue them. Stearns-Roger Manufacturing Co. v. Brown, 8 Cir., 114 F. 939; Imperial Chemical Manufacturing Co. v. Stein, C. C. N. Y. 69 F. 616."

Respondent claims that the position of Respondent and its stockholders has changed, that the value of the properties has materially increased since 1896, and that in and around the year 1896 Respondent's shares and the shares of the federal corporation had little value. The moving affidavit in support of these contentions refers to 1896 and 1897 stock quotations. (R. 285, 286.) A complete answer to that contention is found in the fact that in *Northern Pac. Ry. Co.* v. *Boyd,* 177 Fed. 804, at 817 (C. C. A. 9th, 1910), aff'd, 228 U. S. 482 (1913), the same evidence was ruled non-probative.

The record herein establishes that Respondent has suffered no prejudice or detriment by reason of the claimed delay in instituting litigation. The record shows that the Respondent has secured to itself tre-

mendous benefits and advantages from its exploitation of property which rightfully belongs *pro rata* to the Petitioners herein.

II. EVEN IF IT SHOULD BE HELD THAT LACHES BARS RECOVERY FOR PAST DAMAGE, THE DISTRICT COURT ERRED IN REFUSING TO PROTECT PETITIONERS' EXISTING AND CONTINUING RIGHTS UNDER THE ACT OF JULY 2, 1864, IN THE RAILROAD AND TELEGRAPH FRANCHISES AND RIGHT OF WAY, WHICH, IN ANY EVENT, RESPONDENT WAS NOT COMPETENT TO ACQUIRE.

The suit here has two distinct features: First, it is an action by Petitioners, 3% stockholders in Railroad, to obtain an accounting for past damages. Since 1896 they have received no share of the dividends or earnings from the operation of the railroad. All profits have been retained by Railway, the 97% stockholder. (R. 75, 76.)

Second, and this is the phase to be stressed here. Petitioners seek to undo the violation of their existing and continuing present and future rights in railroad and telegraph franchises and right of way granted to the Northern Pacific Railroad Company. (R. 33, 38.) They seek to prevent the Respondent from continuing to violate this law and their rights and to have restored to the Northern Pacific Railroad Company those franchises and right of way which it alone can lawfully hold as property under the Act of July 2, 1864.

Judge Tamm, in his erroneous disposal of this complicated lawsuit on a motion for summary judgment (See Point III below), failed to treat and take into account this alternative theory of Petitioners' case. His opinion deals only with the application of the doctrine of laches to claims for past damages from 1896 to the date of the filing of the suit. At no point did he distinguish between these claims for past damages

and Petitioners' right to equity protection against current and future violations of their existing statutory contract rights. Moreover, he paid no attention to the franchise question.

Judge McLaughlin, however, in his opinion denying the earlier motion to dismiss, properly distinguished between the two theories of Petitioners' case. (Appendix A, p. 1a.)

A. The complaint and prayer for relief spell out the case for intervention of equity to protect Petitioners' existing and continuing rights as shareholders in the franchises and right of way granted to an existing corporation by the Act of July 2, 1864.

Paragraph X of the complaint (R. 11) refers to Section 2 of the Act of July 2, 1864 (13 Stat. 365), which grants a right of way in perpetuity to the Northern Pacific Railroad Company, a federal instrumentality. It also shows that "the right of way shall be exempt from taxation within the territories of the United States."

Paragraph IX of the complaint shows the grant of the railroad and telegraph franchises in Section 1 of the Act of July 2, 1864, to the stockholders as members of a federal body politic and corporate.

At several places the complaint develops Petitioners' alternative cause of action, namely, the right to protection from present and future violations of the law damaging their existing and continuing rights of property in these franchises and right of way.

Paragraph LII asserts that "the franchises and right-of-way granted to the Northern Pacific Railroad Company under the Act of July 2, 1864, are inalienable without legislative authorization by the Congress of the United States and the purported sales of same

to defendant without such legislative authorization and under the guise of said consent decree and order of 1896 are void and of no effect in divesting said franchises and right-of-way and transferring same to defendant." (R. 33.)[1] See *U. S.* v. *Northern Pacific Railroad Co.*, 95 F. 864, 876-7 (CCA 8th, 1899.) It also asserts that Respondent's illegal possession and control of the franchises and right of way under these void decrees "have wrongfully deprived, *and are so depriving,* the Plaintiffs and others similarly situated of property to which they are entitled under the Constitution of the United States and under the said Act of July 2, 1864." (Emphasis supplied. See Lishman Affid. R. 175, 185.)

Paragraph LV, subparagraph (F) states that "By such claim and enjoyment of the franchises and right-of-way granted to the Northern Pacific Railroad Company, Defendant has deprived *and is depriving the Plaintiffs,* of their property without due process of law." (R. 38. Emphasis supplied.) See also paragraph LXXXII, subparagraph (D), of the complaint (R. 75.)

In support of this cause of action Petitioners pleaded the following facts and circumstances.

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[1] Appraisal of the correctness of Judge Tamm's refusal to protect Petitioners' existing statutory rights should take into account the Act of June 25, 1929 (46 Stat. 41), which authorized institution of the *Land Grant* case, 311 U. S. 317 (1940). In section 4 of that Act, Congress provided that nothing in the Act should affect "the present title" of Railroad to the road and gave Railway protection only with respect to "road or land actually used in good faith * * * in the operation of said road." The allegations in Petitioners' complaint charge that Railway's operation is not in good faith. (See Appendix B, p. 36a.)

First, paragraph VII (R. 9), states that the foreclosure decree relied upon by Respondent for its title to the railroad, franchises and right of way of the federal corporation expressly reserves the question of the validity of the mortgages being foreclosed.

Paragraph XXXIX (R. 20-22), states that on March 2, 1896, the Wisconsin Central Company, the Wisconsin Central Railroad Company, and their Receivers intervened in the foreclosure proceedings, alleging that the mortgages were expressly forbidden by the charter of the Northern Pacific Railroad Company (R. 209) and that the same were invalid. It is also shown that the court signed the foreclosure decree without disposing of this issue and the decree expressly directs that the sale of the railroad, franchises, and right of way should be made subject to the reservation of the issue thus raised. It was further shown that this issue has never been determined. (R. 22.)

It was further pleaded, as is the case, that the claims, issues and equities so reserved have never been determined. (R. 21.)

Second, the complaint also shows that, despite the efforts of Respondent to secure Congressional sanction for the transfer to it of rights to these franchises and right of way, "the Congress of the United States has refused to authorize or accept the defendant, Northern Pacific Railway Company, as the legal successor to the Northern Pacific Railroad Company and has refused to sanction the transfer of such railroad company's franchise and property to the defendant, and no such authorization, acceptance or sanction has ever been made." (For detailed recital of legislative refusals to sanction the transfer of the rights, the franchise and powers of the Northern Pacific Railroad

Company, see Paragraph LIV of the complaint. (R. 35, see Lishman Affid. R. 178, 183-185, 215-236.)

The record also shows that no court has considered or determined that there has been a lawful transfer to the Respondent of the railroad, franchises and right of way granted by Congress to the federal corporation. In *United States* v. *Northern Pacific Railway Company,* 311 U. S. 317 (1940), known as the "Land Grant case", the validity of the transfer of the railroad franchises and right of way was not decided by this Court.[1] Statements in several opinions of this Court that Respondent is the successor of the federal corporation, although attempted to be used by Respondent as *res judicata* on the title question (see, Petitioners' reply brief in the Court of Appeals, pp. 6, 8-9), are not adjudication of this question. In all of these cases the pleadings removed the issue of successorship. The Government's bills of complaint alleged that Respondent had succeeded to Railroad and all its property and franchises. The answers of Respondent and of its captive, Railroad, for obvious reasons, *admitted* the truth of the erroneous Government allegations. (R. 189.)

Third, the complaint further alleges certain courses of corporate conduct by Respondent which serve as recognition of the questionable character of Respondent's right to hold these franchises and right of way. In all of its mortgages purporting to cover properties owned by the Northern Pacific Railroad Company, Respondent has made provision that without consent of the mortgage trustee the mortgaged properties can

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[1] In the *Land Grant* case, 311 U. S. at 342, this Court reserved decision on the allegation in the government's bill of complaint that the 1896 reorganization was fraudulent and collusive.

at any time be transferred to a railroad corporation organized and existing under the laws of the United States. (R. 42, 43.) The only corporation so organized and existing and capable of being such transferee is the Northern Pacific Railroad Company (R. 10-11, 42, 43, 179.)

Further, it was pleaded that "Defendant, holding more than 90 per cent of the capital stock of the Northern Pacific Railroad Company, has kept said company alive and captive since 1896 to do its bidding and to be available as a railroad corporation organized and existing under the laws of the United States, capable of succeeding to the property purported to be mortgaged by Defendant, and, in the meantime, to secure to Defendant for its own personal use and profit, and to the injury of Plaintiffs, the great advantages of the franchises, railroad and telegraph line, and right-of-way, with its said privilege of tax exemption, granted by Congress exclusively to said Northern Pacific Railroad Company" (R. 43-44.)

B. In any event, Respondent had no capacity to take and operate the railroad, franchises and right of way provided in the Act of July 2, 1864.

The Complaint (paragraph LIX, R. 44) alleges: "The Northern Pacific Railroad Company by consent decree or otherwise was incompetent to transfer its railroad, franchises, right-of-way and other property and rights to property to defendant, and defendant was and is incompetent to take and hold same." (See R. 70.)

Certain law and facts further indicate the background of this allegation.

This Court in *Northern Pac. Ry. Co.* v. *Boyd,* 228 U. S. 482, 502 (1913), determined that the consent decree under which Respondent claims is no different than a private assignment from Railroad to Respondent.

Respondent's witnesses, Mr. Morawetz and Mr. Britten, testified before the House Judiciary Committee in 1896 that it would be impossible for the transcontinental main line of railroad and telegraph to be transferred to Respondent unless Congress authorized same. (R. 184.)

Senator Mitchell, reporting for the Committee on the Judiciary on H. Res. 124 (Cong. Rec., 54th Cong., 1st sess., p. 6139), stated that Respondent had applied to Congress "for the grant of a franchise, to be a corporation, and to exercise all the functions of a national corporation, which they cannot exercise at all unless in pursuance of an act of Congress."[1]

This Court in *Oregon Ry. and Nav. Co.* v. *The Oregonian Ry. Co.,* 130 U. S. 1 (1889), determined that the words "successors and assigns" in a statutory grant do not confer authority upon the grantee to transfer the road and the exercise of its franchises. See *Louisville & Nashville Railroad Co.* v. *Kentucky,* 161 U. S. 677 (1896); Elliott on Railroads, 3rd ed., sec. 79.

This Court in *Roberts* v. *Northern Pacific Railroad Co.,* 158 U. S. 1 (1895), expounded the overrid-

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[1] Fletcher on Corporations (Permanent Ed. 1931), vol. 7, sec. 3343, states: "As a rule the purchaser at a foreclosure sale acquires the franchises of the corporation but not the right to exercise them without taking out a new charter." Respondent in 1896, prior to the foreclosure sale, applied to Congress for charter authorization (R. 35, 178, 215-236).

ing importance of the Northern Pacific Railroad Company as a federal instrumentality whose powers and duties of management and control could not be changed either by the Legislature or courts of Wisconsin. Respondent, we submit, by means of a private assignment in the form of a consent decree, could not thereby validate its claimed capacity to succeed to a modified version of the federal corporation's operating franchises and right of way.

Petitioners asked in their prayer for relief (R. 75):

> "That it be adjudged and decreed that the Defendant, Northern Pacific Railway Company, has no right, title or interest in or to the franchises, railroad and right-of-way granted to the Northern Pacific Railroad Company under the Act of July 2, 1864 (13 Stat. 365), and the Joint Resolution of May 31, 1870 (16 Stat. 378), except as holder of the majority of the capital stock and the bonds of said federal corporation, and that title to same is in the Northern Pacific Railroad Company."

Respondent keeps alive the Northern Pacific Railroad Company and its 97% stock interest therein, which it holds as "muniments of title" to the federal corporation's franchises, rights and property (R. 181-183, 246), while asserting that Petitioners' 3% stock in the federal corporation is valueless, and is excluded from the present and continuing benefits of the franchises and property.[1]

There is no basis in fact or law for adjudging that Petitioners continued and uninterrupted 3% stock ownership can be nullified by laches, while Respondent's 97% stock ownership may still continue to be

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[1] See discussions of that point in Petitioners' Petition for Rehearing before Court of Appeals, Appendix D, Point II.

used by it to dominate the federal corporation. It was manifest error to disregard the complaint and its prayer asking judgment that Respondent has no greater present interest in the franchises and property of the federal corporation than is represented by its 97% stockholding therein. See *U. S.* v. *Northern Pacific Railroad Company,* 95 F. 864, 876-7 (CCA 8th, 1899).

C. The cases require the intervention of equity to protect continuing and existing rights from future violation of the law creating those rights, despite the applicability of equitable defenses, such as laches and estoppel, to attempts to recover for past violations.

Petitioners have contended heretofore (see Point I, *supra*) that the courts below erred in holding laches to be a bar to Petitioners' complaint in its entirety, asserting various contentions arising out of the statutory background of the violation and the facts concerning the absence of the necessary elements of laches. Petitioners now assert that, whatever may be the applicability of laches to recovery for past wrongs, laches is no defense to a suit to correct a present illegality and to prevent future violations.

A line of cases dealing primarily with rights in the ownership and operation of railroad property support this position. *Pennsylvania R. R. Co.* v. *St. Louis, etc., R. R. Co.,* 118 U. S. 290 (1886); *Central Transportation Co.* v. *Pullman's Palace Car Co.,* 139 U. S. 24 (1891); *United States* v. *Southern Pacific Co.,* 259 U. S. 214, 234 (1922); *Cf. Texas & Pac. R. Co.* v. *Pottorff,* 291 U. S. 245 (1934).

In the *Pennsylvania Railroad Company* case (118 U. S. 290) plaintiff secured an injunction on a bill in equity involving a lease by one railroad to another

of its road and franchise. It was held that the lease was void because neither company had power to enter into it and that a guaranty of the obligations of the lease was also void. But it was contended in the Supreme Court that "though the contract of lease may be void, so that no action could originally have been sustained upon it, there has been for ten years such performance of it, in the use, possession and control of plaintiff's road and its franchises by the defendants, that they cannot now be permitted to repudiate or abandon it." It was further argued that the situation presented one of a class of cases which hold that "where a void contract has been so far executed that property has passed under it and rights have been acquired under it, the courts will not disturb the possession of such property or compel restitution of money received under such a contract." (118 U. S., at 316) The Supreme Court rejected this contention, stating:

> "But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it. Looking at the case as one where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands. We know of no well-considered case where a corporation which is party to a continuing contract which it had no power to make, seeks to retract, and refuses to proceed further, it can be compelled to do so." (118 U. S., at 317.)

The *Central Transportation Company* case was an action to recover a sum due on a lease by the plaintiff of its property to the defendant. The defense was

that the lease sued on was void in law because *ultra vires* the powers of each of the corporations by and between whom it was made. It was argued on behalf of the plaintiff that, even if the contract sued on was void, because *ultra vires* and against public policy, yet that having been fully performed on the part of the plaintiff and the benefits of it received by the defendant for a long period, the defendant was estopped to set up the invalidity of the contract as a defense. In rejecting the contention of estoppel the court followed the doctrine of the *Pennsylvania Railroad* case noted above. This case is of interest because it states clearly the doctrine applicable in the present situation, where the Northern Pacific Railroad Company, acting under the control of 97 per cent of its stockholders, disposed of its property in violation of the charter powers conferred upon it. The opinion in this respect reads as follows:

> "The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation, which is *ultra vires,* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

"When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities, which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws." (139 U. S., at page 60.)

This Court has also determined that railroads have such continuing rights to the lands in their right of way that neither the doctrine of laches nor of adverse possession has any standing to bar them from asserting their paramount continuing right. *Great Northern Railway Company* v. *Steinke,* 261 U. S. 119 (1923); see also *Northern Pacific Railway Company* v. *Townsend,* 190 U. S. 267 (1903).

Perhaps the clearest line of cases on the proposition that laches does not shut off the right to protect continuing rights from future violations, is that involving patent and trademark infringement (see *Shaffer* v. *Rector Well Equipment Co.,* 155 F. (2d) 344 (C. C. A. 5th, 1946); *Menendez* v. *Holt,* 128 U. S. 514 (1888); *Hanover Star Milling Co.* v. *Metcalf,* 240 U. S. 403 (1916)).

In *Menendez* v. *Holt,* plaintiffs, asserting certain trademark rights, which had been and were being violated by defendants, sought an accounting for past damages and a decree entitling them to exclusive use of the trademark in question. The lower court refused the accounting but found that the defendants had in-

fringed the rights of complainants and decreed a perpetual injunction. On appeal, this Court considered at length the contention that whatever rights plaintiffs may have had were lost by laches, because of its long delay over a period of years in instituting the suit. Mr. Chief Justice Fuller, in his opinion, said:

> "So far as the act complained of is completed, acquiescence may defeat the remedy on the principle applicable when action is taken on the strength of encouragement to do it; but so far as the act is in progress, and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of an estoppel could rarely arise." (128 U. S., at 524)

This principle of affording protection to trademark rights in the future through injunctive relief, while denying an accounting for profits for past infringement, was followed in the *Hanover Star Milling Co.* case, *supra.* In *Shaffer* v. *Rector Well Equipment Co., supra,* the same principle was applied in a patent infringement case. The opinion noted that:

> "The company not only sought an accounting for damages, but it sought an injunction to prevent further infringement, which called for a determination of the validity of the patents and whether or not plaintiffs were entitled to prohibit further alleged infringement. Even if laches had been shown and deemed to be a defense against accounting for damages that had accrued in the past, it does not follow that this should deprive the plaintiffs of a right to an injunction, if their patents were valid and had been infringed." (155 F. (2d), at 347.)

* * * * *

From the foregoing cases, it would seem that Judge Tamm, even if he were correct in entertaining a defense of laches to Petitioners' efforts to recover on an accounting, relating to the past, was guilty of error and a failure to do equity in refusing to consider the other theory of Petitioners' complaint; namely, their right to have adjudged the important current and future public question of whether the franchises and right of way in question are now lawfully retained in the ownership and possession of the Northern Pacific Railway Company. Whatever equitable defense may arise out of Petitioners' failure to go into a court to seek relief while they were continuously and repeatedly seeking legislative and administrative redress, clearly equity demanded a determination of the long reserved question as to whether or not the franchise and right of way were validly transferred. This is particularly true because of the fact that Congress both before and after the foreclosure decree has refused to authorize Railway's succession to the franchises and right of way.

Judge Tamm erred in not taking into account the deliberate course of conduct followed by the Respondent to maintain a corporate position which would enable it to abide by a decree adjudging the rights in the franchises and rights of way to be in the Northern Pacific Railroad Company. This course of action was well pleaded. If these allegations had been accepted for the purposes of Rule 56 they would establish that a judgment in conformity with the second paragraph of the plaintiff's prayer could work no serious inequity upon either the Respondent or upon any third persons.

Judge Tamm's refusal to accept or even to consider the carefully pleaded allegations in the complaint sub-

stantiating the separate basis for relief and the Court of Appeals' sanction thereof is so far a departure from the accepted and usual course of judicial proceedings as to call most urgently for the exercise of this Court's power of supervision.

A sharp distinction should be drawn between the present situation and one where a suit to restore property rights is purely private in nature. In this case, the proper judgment and determination of ownership, along the lines prayed for in paragraph 2 of Petitioners' prayer, will serve not only their private purpose in retaining those rights in a corporate ownership, where they will benefit from their future enjoyment, but also a public purpose of effectuating the public law and will of Congress, as expressed in the Act of July 2, 1864.

III. THE DECISIONS BELOW, CONTRARY TO THE APPLICABLE DECIDED CASES, HAVE USED, AND SANCTIONED THE USE OF, SUMMARY JUDGMENT PROCEDURE TO DETERMINE A COMPLICATED CASE INVOLVING IMPORTANT PUBLIC ISSUES.

A reading of the record and the extensive briefs filed in this action in the District Court or even in the Court of Appeals will be sufficient to show that it was erroneous to employ summary judgment procedure to decide the case at bar. Highly complicated issues concerning important public questions, and questions of the validity of court decrees, the effect of reservations in decrees, the true administration of justice, and the rights of citizens under a statutory contract are inseparably involved in the laches determination.

Our discussion in Points I and II indicates the complicated nature of the case, even on the narrow base of the decision below that the doctrine of laches barred

relief. Our discussion also specifies some of the important public issues involved, *e.g.*,

(1) Whether the doctrine of laches is applicable to the continuing deprivation of existing private property rights (stockholder interest in an existing corporation) by a present and continuing violation of a federal law. (Act of July 2, 1864, 13 Stat. 365 and Joint Resolution of May 31, 1870, 16 Stat. 370.)

(2) Whether resort to legislative and executive relief prevents the claim that laches bars prosecution of judicial proceedings.

This proceeding involves more than the question of Petitioners' property rights. In addition to the questions of public importance already indicated is the one as to whether the federal government has any responsibility to protect the rights of persons who accepted its invitation to invest in a railroad property set up in the manner and for the purposes described in the Act of July 2, 1864. By the very nature of the issues involved, this case is not susceptible of, and should not be decided by summary adjudication. Without careful and orderly analysis of the numerous statutes and documents involved and determination of the issues arising from them, at the trial court level, there is no adequate basis for appellate review. The District Court failed to analyze the statutes and documents and to determine important public and private issues which were before it. In so doing it violated the principles enunciated in *Arenas* v. *United States*, 322 U. S. 419 (1944); *Eccles* v. *Peoples Bank of Lakewood Village, Cal.*, 333 U. S. 426 (1948); *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249 (1948); *Palmer* v. *Chamberlin*, 191 F. (2d) 532 (C. C. A. 5th, 1951).

In *Kennedy* v. *Silas Mason Co., supra,* Mr. Justice Jackson stated the governing standard of trial court action which should have been applied in the present case, saying:

> "The short of the matter is that we have an extremely important question . . . The case . . . comes to us almost in the status in which it should come to a trial court. In addition to the welter of new contentions and statutory provisions we must pick our way among over a score of technical contracts, each amending some earlier one, without full background knowledge of the dealings of the parties. The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties, and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of 9. . . .
>
> We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide." 334 U. S. 249, 256-257.

The departure from this doctrine has led in the instant case to summary adjudication that does justice neither to the legal issues involved nor to the party against whom the judgment is rendered.

In deciding that the Petitioners' entire cause was barred by laches, by reason of the passage of time from the date of the initial invasion of those rights by the consent mortgage foreclosure of 1896, the trial court ignored a basic contention of the Petitioners (see Point II, *supra*). Petitioners asserted rights in property vested in them under the Act of July 2, 1864, which the Respondents not only violated in 1896 and in each succeeding year thereafter, but are currently and continuingly violating. These property rights and claims were expressly reserved in the final decree of foreclosure and sale of the Circuit Court of the United States for the Eastern District of Wisconsin under which the Respondent claimed successorship (see Complaint, paragraphs XXXIX, LII and paragraph 2 of the prayer for relief; R. 21, 33, 75; also Lishman Affid. R. 189, 192).

It is one thing to rule that laches is a bar to an action where the alleged wrongdoing took place many years ago. An entirely different question, however, is presented when laches is held to bar a cause of action founded upon the current violation of a federal law and existing statutory contract. It was incumbent upon the District Court to meet these separate issues squarely and to render decision in such a manner as to place this case in proper posture for appellate review.

Another illustration of the failure of the District Court to do justice to important issues in this case is its conclusion with no support in the record, that granting of any relief "would create a concentric chaos". (Appendix A, p. 17a; see Petitioners' Court of Appeals Brief, p. 42.) Petitioners asserted in their complaint (R. 5, 42-43, see Lishman Affid. 179, 183) that the Respondent, far from acting in reliance upon any alleged acquiescence of Petitioners in the asserted wrongdoing, has conducted its affairs so as to antici-

pate an eventual rectification and to keep itself in a position to be able to respond to the type of equitable relief requested with a minimum of disruptive effect.

It is most material to the question of laches that Respondent has maintained its affairs in such a fashion as to be able readily to return Railroad's properties. It is also material to note that upon such return, the stockholders of Railway, as owners of 97% of the stock in Railroad, will continue to enjoy an only slightly, but properly, reduced interest in those properties. This readily available device for doing justice to the 3% stockholders of the Northern Pacific Railroad Company is not mentioned in the District Court's opinion. Instead, it conjures with the novel concept of "concentric chaos" in the face of the facts of record which establish the exact contrary. A careful examination of the available facts in documents (R. 5), the questioning of available expert witnesses as to the effect of the re-transfer of Railroad's properties back to it on the value of Respondent's securities or as to the effect upon operations of the facilities in question, and the development of detailed findings of fact on this point are the minimum of requirements imposed by the need for good judicial administration. In a summary judgment procedure, it was not possible, of course, to do any of these things.

CONCLUSION.

The courts below, by summary judgment of dismissal, have avoided their duty in a matter of far-reaching importance (Appendix D, p. 47a, Point II). If the facts sustain the existence of Petitioners' statutory contract rights in a railroad and railroad franchise, then the doctrine of laches has no application. Similarly, laches is inapplicable if the facts sustain that Respondent has been and is guilty of misuse of

the judicial process to the detriment of the Petitioners.

Good judicial administration requires that these matters establishing the inapplicability of the doctrine of laches should not be summarily ignored or dismissed as plausible argument (Appendix A, p. 11a). Rule 56 was never intended to abolish the right of Petitioners to establish in open court, after full inquiry and fair evaluation of admissible evidence (Appendix D, p. 47a, Point I), that they are being deprived of statutory property rights by means of consent decrees procured by fraud of the Respondent. Nor was this Rule intended to preclude Petitioners from establishing that institution of costly court action has been effectively hampered by Respondent's misuse of the consent decrees as conclusive adjudications that its 97% stock ownership in the federal corporation entitles it to all the benefits and advantages of the main line federal railroad established by the Act of July 2, 1864, and that Petitioners' 3% stock is valueless.

It is respectfully submitted, therefore, that certiorari should be granted at this time, and the decision of the Court below should be reviewed and reversed on the questions presented by this petition.

Respectfully submitted,

HENRY H. FOWLER,
ALEXANDER B. HAWES,
ROBERT W. LISHMAN,
MARX LEVA,
EDWARD BROWN WILLIAMS,
Attorneys for Petitioners.

FOWLER, LEVA, HAWES
& SYMINGTON,
Of Counsel.

August 8, 1955.

APPENDIX

APPENDICES

APPENDIX A

Opinions Below

Opinion of McLaughlin, J., in Landell, et al. v. Northern Pac. Ry. Co., United States District Court for the District of Columbia, March 9, 1951 (98 F. Supp. 479).

The plaintiffs are minority holders of shares of stock in the Northern Pacific Railroad Company, a Federal Corporation, organized and existing under the Act of July 2, 1864 (13 Stat. 365), the owners of which stock refused to join in the reorganization of said company in 1896 growing out of foreclosure proceedings before the United States Circuit Court for the Eastern District of Wisconsin. The defendant became the holder, in said reorganization proceedings, of more than ninety per cent of the stock of the old company. In this action the plaintiffs as such minority stockholders pray that the decrees of the Federal Court of Wisconsin in the above mentioned foreclosure proceedings be adjudged and decreed to be null and void and the title to the franchises, railroad and right of way granted to the Northern Pacific Railroad Company under the aforementioned Act of July 2, 1864 and the Joint Resolution of May 31, 1870 (16 Stat. 378) be decreed to be in the Northern Pacific Railroad Company and
340 that the Northern Pacific Railway Company be adjudged and decreed to have no right, title or interest in or to the franchise, railroad and right of way so granted to Northern Pacific Railroad Company except as the holder of the majority of the capital stock and the bonds of said federal corporation. In addition plaintiffs pray for an accounting with defendant and further pray that all property, profits, benefits and advantages belonging to Northern Pacific Railroad Company or arising or accruing from its property and rights received, acquired or claimed by defendant, or any of its subsidiaries or

agents pursuant to the aforementioned decrees or orders of the Federal Court of Wisconsin be ratably distributed among all the shareholders of Northern Pacific Railroad Company in proportion to the holdings of such shareholders in said Railroad Company.

Defendant moves to dismiss (1) for improper venue, (2) for lack of an indispensable party to the action, to wit Northern Pacific Railroad Company, and (3) for lack of service.

In support of its motion to dismiss for improper venue defendant contends that the action is local since the principal question involved in the case is the title to land and that actions of a local nature must be brought where the property involved, or some part thereof is located.

The principle announced in Massie v. Watts, 6 Cranch (10 U.S.) 148 appears to apply in the circumstances of the instant case since this action, like the Massie case, is not one "involving a naked question of title". In the case at bar the plaintiffs seek to hold defendant liable for an accounting as a majority stockholder occupying a fiduciary relationship to plaintiffs as minority stockholders. This Court is of the opinion that the observation of Chief
341 Justice Marshall in the Massie case is applicable to the present situation, namely, "the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends does not seem sufficient to arrest that jurisdiction". Thus the action being grounded in breach of trust and transitory in character is maintainable wherever jurisdiction can be established over the defendant.

The portion of defendant's motion which seeks dismissal on the ground of plaintiffs' failure to join an indispensable party, namely, Northern Pacific Railroad Company, is not sustainable in view of the character of the action brought by plaintiffs as shown by the allegations of the petition and the relief prayed therein. The suit is brought against Northern Pacific Railway Company as trustee. It is not directed against the old company which defendant con-

tends should be made a party. Its purpose is to hold the Northern Pacific Railway Company as trustee for the plaintiffs for the property which it has received. The rule announced by the Supreme Court of the United States in Southern Pacific v. Bogert, 250 U.S. 483 (1919) appears to be peculiarly applicable. In that case the circumstances were that the Southern Pacific had foreclosed a mortgage on the property of the Houston and Texas Central Railway Company in 1888 and said property was acquired by the Houston and Texas Central Railroad Company. Bonds of the old company were exchanged for those of the new and all the stock in the new company was issued to Southern Pacific. The minority stockholders of the old company received nothing and in 1913 said minority stockholders of the old company brought suit in the State Court in New York praying that Southern Pacific be declared trustee for them of stock in the new company and prayed further for an accounting. The suit was removed to the Fed-
342 eral Court, Eastern District of New York. Plaintiffs prevailed in the trial court and on appeal in the Circuit Court of Appeals. The Supreme Court affirmed, remanding the case to the District Court for the purpose of accounting. In the opinion in the case in 250 U. S. 485, the Court stated, at page 485:

"In considering the many objections urged against the decree, it is important to bear constantly in mind the exact nature of the equity invoked by the bill and recognized by the lower courts. The minority stockholders do not complain of a wrong done the corporation or of any wrong done by it to them. They complain of the wrong done them directly by the Southern Pacific and by it alone. The wrong consists in its failure to share with them, the minority, the proceeds of the common property of which it, through majority stockholdings, had rightfully taken control. In other words, the minority assert the right to a pro rata share of the common property; and equity enforces the right by declaring the trust on which Southern

Pacific holds it and ordering distribution or compensation. The rule of corporation law and of equity invoked is well settled and has been often applied. The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors. If through that control a sale of the corporate property is made and the property acquired by the majority, the minority may not be excluded from a fair participation of the fruits of the sale."

At page 487 the Court said further:

"The Southern Pacific also urges that the suit must fail because the old Houston Company is an indispensable party and has not been joined. The contention proceeds upon a misconception of the nature of the suit. Since its purpose is merely to hold the Southern Pacific as trustee for the plaintiffs individually of the property which it has received, the old Houston Company is in no way interested and would not be even a proper party."

Defendant asserts that plaintiffs are not seeking the same remedy as was afforded by the Bogert case, supra; that in the Bogert case the plaintiffs affirmed and
343 ratified the foreclosure sales, whereas in the instant case the minority stockholders have repudiated all elements of the reorganization of Northern Pacific Railroad; that in the Bogert case the reorganization plan was attacked as unfair and inequitable and recovery was sought of the minority holder's fair share in the proceeds of the sale, whereas here plaintiffs seek to set aside the court decrees as void. Accepting arguendo, such interpretation of the Bogert case, it would not appear that the variations would render inapplicable the use of the rule expressed therein. In that case it had been contended that the rule holding majority stockholders to a fiduciary relationship toward the minority holders should not be applied because Southern Pacific was not a direct stock-

holder but exerted its control through a subsidiary. Commenting on this contention the Court stated:

"But the doctrine by which the holders of a majority of the stock of a corporation who dominate its affairs are held to act as trustee for the minority does not rest upon such technical distinctions. It is the fact of control, of the common property held and exercised, not the particular means by which or manner in which the control is exercised that creates the fiduciary obligation. * * * The essential of the liability to account sought to be enforced in this suit lies not in fraud or mismanagement but in the fact that, having become a fiduciary through taking control of the old Houston Company, the Southern Pacific has secured fruits which it has not shared with the minority. The wrong lay not in acquiring the stock, but in refusing to make a pro rata distribution on equal terms among the old Houston Company stockholders."

It would appear that the relief sought by plaintiffs in the instant case is essentially similar to that sought in the Bogert case and that the rule announced in the Bogert case should, a fortiori, apply herein, since in this case plaintiffs, or their predecessors, have always persisted in
344 the claim that the reorganization was invalid and that the transfer of assets to the majority stockholders was illegal, whereas in the Bogert case the minority holders had for a time acquiesced in the reorganization plan.

As the basis for its motion to quash service, defendant argues that the corporation does not come within the rule of "doing business" so as to make it amenable to service here in the District of Columbia. Theirs, it is argued, is merely a matter of solicitation. Plaintiffs argue that defendant comes within the rule of "solicitation plus" and thus may be served in personam.

This question of the amenability to service in personam of a foreign corporation in a forum distant from its state of incorporation, does not lend itself to a general rule.

Rather the facts of each individual case must be their own criteria. However, two general principles appear to have evolved. One is that solicitation in and of itself does not render a foreign corporation subject to suit, Green v. Chicago, B. & Q. R. Co., 205 U.S. 530 (1918). The other is that solicitation "plus" some other activity does subject the foreign corporation to liability to suit. International Shoe Co. v. Washington, 326 U. S. 310 (1945). And the doctrine is generally accepted that "very little more than 'mere solicitation' is required * * *". Frene v. Louisville Cement Co., 77 A.D.C. 133 (1943). Thus a determination on this question can only be reached by analyzing any and all activities which the foreign corporation may carry on in this forum.

The defendant corporation, organized and existing under the laws of Wisconsin with its main office in St. Paul, Minnesota, has been present here in the District of
345 Columbia since 1940. It conducts an office in the Shoreham Building and employs four persons known as "district passenger agent, district freight agent, general agent and a combination 'stenographer and chief clerk'." The office is organized into two departments, viz the freight and the passenger departments. The business which the defendant carries on is undoubtedly solicitation. However, defendant goes further than this. It also sells tickets for travel on defendant's line only, and in the calendar year of 1950 it sold 24 such tickets. It also sells "railroad pre-paid orders" and in the calendar year 1950 it sold 8 of these. There is nothing in the record to indicate that such total sales were as the result of any limitation. There is no reason suggested as to why the defendant would not have been able to sell more than such totals were it to have sufficient customers to whom such sales may have been made. The money from the sales of such tickets and orders is deposited in a local bank.

In addition to the "solicitation plus rule" more recent cases have demonstrated a tendency to place the solution of the question more upon a recognition of whether or not

the foreign corporation, enjoying the benefits of a local jurisdiction, may deny its subjection to such jurisdiction when it itself is the object of suit. In International Shoe case, supra, it was said:

"* * * to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and so far as these obligations arise out of or are connected with the activities within the state, a procedure which required the corporation to respond to a suit brought to enforce them, can in most instances, hardly be said to be undue".

346 In this connection see Western Smelting & Refining Co. v. P. R. R. Co., 81 F. Supp. 494 (D.C. Neb., 1948) and State of Md. for use of Chrysler v. Eastern Air Lines, 81 F. Supp. 345 (D.C.D.C. 1948).

It would appear, therefore, that the defendant company is enjoying the fruits of the local jurisdiction. And as such either under the "solicitation plus" theory or the more liberal doctrine as announced in the International Shoe case, supra, it is amenable to process in the District of Columbia.

Defendant further contends that the motion to dismiss should be granted on the principle of forum non conveniens. The difficulties attendant upon presentation of the defense as relied upon by counsel in its affidavits and arguments do not in the Court's opinion justify granting of the motion on the ground assigned. See Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 508 (1947).

It is the opinion of this Court, therefore, that the motion to dismiss based upon the three foregoing grounds should be overruled. Counsel for Plaintiffs will prepare appropriate Order.

/s/ CHARLES J. McLAUGHLIN
Judge

March 9, 1951.

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Opinion of Tamm, J., in Landell, et al. v. Northern Pac. Ry. Co., United States District Court for the District of Columbia, June 23, 1954 (122 F. Supp. 253).

The issues of this case reach back over a period of ninety years to the time when Congress sought the expansion of the West by encouraging settlers and railroads through the inducement of free land which, at that time, must have seemed limitless. In this pioneer setting, on July 2, 1864, Congress created a Federal corporation, the Northern Pacific Railroad Company (hereafter referred to as the Railroad).[1] Financial difficulties eventually caused the appointment of receivers in 1893, and in 1896, pursuant to a reorganization plan and foreclosure proceedings under consent decrees in the Circuit Court of the United States for the Eastern District of Wisconsin, the Northern Pacific Railway Company (hereafter referred to as the Railway), a Wisconsin corporation, acquired the Railroad with its land grants and other properties, and has since operated the road and has obtained patents for millions of acres under the land grants. Successors in interest to non-assenting minority stockholders of the Federal corporation under the reorganization bring this suit against the Railway to set aside the decrees and orders of the Circuit Court of the United States for the Eastern District of Wisconsin, to declare title to the Railroad, franchises, and all other properties of the Railroad to be still
1256 in the Railroad, and to have the Railway account to the Railroad for all properties and profits received during the past half century. Plaintiffs' allegations are substantially that the defendant became the legal successor to the Railroad by a fraud upon the Wisconsin court, that defendant has maintained this position by the misuse of judicial process, that the Wisconsin court exceeded its authority in approving conditions in the consent decrees which were in violation of the statute creating the Federal corporation, and that the proceedings were also void in that the United States was not made a party thereto.

[1] 13 Stat. 365.

Defendant Railway has moved for summary judgment on the grounds that the action is barred by the statute of limitations and by laches. Consideration of this motion requires a review of the events preceding the filing of the present action on December 20, 1950.

After refusing to join in the reorganization of 1896, the dissenting stockholders, by written agreement in 1898, formed a committee to protect their rights and interests. Over the years, counsel for the committee and its members have been actively protesting possession by the Railway at stockholders' meetings of the Railway, to the Department of the Interior, the Interstate Commerce Commission, Attorneys General, and have agitated for Congressional investigation.

On the legal side, three suits are of special interest in consideration of the present motion. The first of these was brought in 1900 in the United States District Court for the Southern District of New York by Joseph Hoover "on behalf of himself and of such other stockholders of the Northern Pacific Railroad Company as may inter-
1257 vene and become parties hereto."[2] The action was against the Railway and others involved in the 1896 reorganization and in substance attacked these proceedings on many of the same grounds alleged by the present plaintiffs. After numerous periods of inactivity, the Hoover case was dismissed for lack of prosecution and a motion to restore it to the calendar was denied for inexcusable laches by Judge Hulburt on March 15, 1939.[3] Neither the Committee of the minority stockholders nor any of its members individually at any time attempted to participate officially in this suit, although they followed the proceedings, and counsel for Hoover was also counsel for the committee. Subsequent to dismissal of the suit, it was learned that Hoover, instead of being a bona fide non-assenting shareholder, had actually participated in the

[2] Deposition of Plaintiff Robert W. Lishman, p. 22, Exhibit 9, p. 3.

[3] Unreported Opinion. See Lishman deposition, Exhibit 123.

reorganization, voting some of his stock in favor of the reorganization.

The second suit, United States v. Northern Pacific Railway Co., 311 U. S. 317, is also known as the Land Grant Case. In 1924, President Coolidge and the Secretaries of Agriculture and Interior asked Congress to investigate the land grants to the Northern Pacific Railway Company. After a five-year study, a joint committee of Congress recommended that the Attorney General be authorized to institute an action to obtain "a final and complete determination of the respective rights of the United States and the Northern Pacific Railway Company to the end that the grants shall be finally adjusted and the interests of the United States and the grantee shall be fully protected."[4] Congress approved the recommendation[5] and suit was begun by the Attorney General in 1930. The 1258 District Court referred the case to a Special Master who made one report in 1933 and another in 1937. After the second report in 1937, minority stockholders of the Railroad attempted to intervene. The motion was denied as coming too late in the progress of the litigation. Schmidt et al. v. U. S., 102 F. 2d 589. Upon remand of U. S. v. Northern Pacific Railway Co. by the Supreme Court to the District Court for further proceedings, a second petition by the minority stockholders for leave to intervene was made and denied. 41 F. Supp. 273.

The third suit is the present one, the first suit initiated by the committee since its formation in 1898. From the briefs filed and the oral arguments for and against granting the motion for summary judgment, three questions are posed: (1) Does the statute of limitations apply as a bar to this action; (2) Is this the kind of situation to which the doctrine of laches can be applied; and if so, (3) Do the facts in this case warrant such application.

Since the Court, for the reasons set forth below, finds that the plaintiffs are barred by laches, it is not necessary

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[4] S. Rep. No. 5, 71st Cong. 1st Sess.

[5] 46 Stat. 41.

to pass on defendant's contention that this suit falls within the concurrent jurisdiction of law and equity and therefore the statute of limitations must be applied.

Plaintiffs maintain that the doctrine of laches cannot apply to a case like the present one in which it is alleged that (1) an act done is in violation of a statute, and in which this violation still continues today; (2) in which a court acts beyond its powers; and (3) in which a decree is procured by a fraud upon the court. Plaintiffs
1259 make the plausible argument that a transaction which is fraudulent and illegal in its inception cannot be made legitimate and lawful by the passage of time. This is a basically sound argument. Does it not follow, however, that persons injured by an allegedly fraudulent transaction must exercise their legal rights within some reasonable period of time, at least within the lifetime of some party or witness to the original transaction? It is this Court's view that although time may not make legal that which is illegally conceived, time may bar the capacity of allegedly injured persons to complain of the transaction. Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U. S. 342, 349.

The Court is asked to accept as an equitable proposition the idea that a suit is never barred where the above enumerated conditions exist. As Mr. Justice Story remarked: "It is for the public interest and policy to make an end to litigation, or as was pointedly said by a great jurist, that suits may not be immortal, while men are mortal." Ocean Insurance Co. v. Fields, 2 Story, 59; 18 Fed. Cas. 532. Present plaintiffs are asking the aid of equity against an alleged wrongdoer but deny that the principles of equity may be evoked as against themselves. It has long been settled that the public interest, intervening equities of third parties and the rule of "clean hands" may all operate to raise the bar of laches. Vigilantibus non dormientibus aequitas subvenit. "If the complainant may put forward these excuses for delay after thirty

years, there is no reason why they may not allege the same as an excuse after the lapse of sixty. The truth is, there must be some limit of time within which these
1260 excuses shall be available, or titles might forever be insecure. The interests of public order and tranquility demand that parties shall acquaint themselves with their rights within a reasonable time, and although this time may be extended by their actual ignorance, or want of means, it is by no means illimitable." Wetzel v. Minnesota Railway Transfer Co., 169 U. S. 237, 241.

On the final point, whether laches applies under the facts of this case, the Court finds against the plaintiffs for the following reasons:

Plaintiffs assert that there has been no lack of diligence since for more than fifty years they have continuously sought administrative and legislative relief. In other words, they raise the novel point that an injured party can avoid laches by seeking remedies other than legal. Under limitations, a plaintiff may safely resort to peaceful settlement of his claims (Shaffer v. Rector Well Equipment Co., 155 F. 2d 344), or pursue an administrative remedy provided for by statute (Order of Railroad Telegraphers v. Railway Express Agency, supra). But this right is not perpetual. If it is in the public interest that there be an end to litigation, certainly it cannot be held that diligence can be handed down successfully from one generation to another. This is literally true in the present case since not one of the original dissenting stockholders is alive today, nor are any of the original parties who participated in the reorganization of 1896, nor even any of the original counsel for the Railway or the protective committee.[6]
1261 It thus appears that no party, attorney or witness to the 1896 proceedings is alive today to affirm or deny these ancient charges. As the Court said in Abraham

[6] Unreported opinion of Judge Hulburt in the Hoover case, supra; affidavit of Hugh McLeod, Assistant Secretary of Northern Pacific Railway Co. and affidavit of R. Gordon Wasson, Vice President of J. P. Morgan & Co., Inc., exhibits A and B respectively of defendant's motion for summary judgment.

v. Ordway, 158 U. S. 416, 421: "Length of time necessarily obscures all human evidence and deprives parties of the means of ascertaining the nature of original transactions; it operates by way of presumption in favor of the party in possession. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor."

No matter how plaintiffs sought relief in the past, what they sought then and seek now is a declaration of their legal rights, and ultimately legal rights must be determined in a judicial proceeding. Even "the mere institution of a suit does not of itself relieve a person from the charge of laches, and [that] if he fail in the diligent prosecution of the action, the consequences are the same as though no action had been begun." Johnson v. Standard Mining Co., 148 U. S. 360, 370. "[T]he mere assertion of a claim, unaccompanied by any act to give effect to it, cannot avail to keep alive a right which would otherwise be precluded." Mackall v. Casilear, 137 U. S. 556, 567.

The fact is that plaintiffs deliberately and under the advice of competent counsel[7] chose their course for over fifty years. The written agreement of 1897 creating the protective committee authorized the committee "to institute and conduct all such proceedings at law or in equity" necessary to protect and assert the rights
1262 of the minority stockholders.[8] Represented by able counsel, these stockholders and their heirs have attempted unsuccessfully for over half a century to persuade others to fight the legal battle, and finally, under circumstances not shown to differ materially from the situation through the years, they have decided to ask for

[7] Counsel for the committee included Joseph P. McCullen, member of the bar of Philadelphia and later judge of one of the municipal courts of Philadelphia; and John G. Johnson, outstanding member of the Philadelphia bar.

[8] Lishman deposition, p. 8, exhibit 1. See also to the same effect the revised agreement of 1906, Schedule A of the complaint.

a legal determination of their legal rights by a legal tribunal.

It would seem that long ago plaintiffs should have been cautioned by the unproductive results of their protests to the non-judicial branches of the government. In 1897, during the term of President McKinley, counsel for the committee appealed to the Secretary of the Interior, and the matter was referred to the Attorney General who held the claims were unfounded. 21 Opinions of the Attorney General 486. In 1904, during the administration of President Theodore Roosevelt, another appeal was made to the Secretary of the Interior. It was again referred to the Attorney General and again was rejected by him. 25 Opinions of the Attorney General 401. Thus, twice, executive officers with the responsibility of guarding the public interest put plaintiffs on notice that no support would be forthcoming from that branch of the government.

The committee fared no better in its attempts to institute Congressional investigation, although plaintiffs allege that they were responsible for the United States' bringing suit in the Land Grant case. Even if we assume the truth of this allegation, plaintiffs are faced with the finding of laches in their attempts to intervene in that suit. As the Court states in its opinion, Schmidt v. U. S., supra, pp. 595-6:

1263 "The appellants account for their delay in presenting their petition for leave to intervene on the ground that they assumed that all the issues stated in the act of June 25, 1929, would be presented and tried in the case, but that when they ascertained that all these issues had not been passed upon and the Court was moving toward a final decree without such determination of all these issues, they sought to intervene. This contention is inconsistent with the claim that the minority stockholders of the Railroad Company had been exercising the greatest possible diligence since 1875, and particularly since 1896, to establish their rights and that the act of June 25, 1929,

resulted from their persistence * * *. Having, as they claim, so far succeeded in their efforts they then remained dormant for nearly seven years after the Attorney General had filed a complaint in this action in which it was alleged that the Railway Company was the successor in interest to the Railroad Company which allegation was admitted by both companies. The admission by the Railroad Company was made more than five years before the appellants attempted to intervene."

Nor can plaintiffs assert that the defendant has ever indicated anything but opposition to their claims. This opposition was noticed as far back as 1902 by a resolution passed at the anual meeting of the majority stockholders.[9] This opposition has continued unabated through the years as indicated by repeated actions at annual stockholders' meetings. The Railway's answer in the Hoover suit was again notice to plaintiffs that the defendant denied these alleged rights and would resist them in court. Railway's unwavering opposition was a plain indication that it would not yield to anything less than adverse court action. Norris v. Haggin, 136 U. S. 386.

The fact, as plaintiffs aver, that their counsel advised administrative and legislative instead of judicial action is a fact which militates against them. Faulty judgment of counsel is certainly no defense against the charge of laches. Nor is the argument that these non-legal methods were far less costly than court action. "His 1264 [plaintiff's] poverty or pecuniary embarrassment was not sufficient excuse for postponing the assertion of his rights." Hayward v. National Bank, 96 U.S. 611, 618. See also Leggett v. Standard Oil Co., 149 U. S. 287;

[9] Lishman deposition, exhibit 26: "RESOLVED: That the stockholders of the Northern Pacific Railroad Company expressly dissent from any action pretending to be taken in the name of or on behalf of the stockholders of this Company in anywise bringing in question in Congress or in any State of the United States the validity and completeness of such foreclosure proceedings or the title of the Northern Pacific Company to its railroad land grant and property formerly of this Company, and declares any statements or action questioning the same as unwarranted and unfounded in law and in fact."

Levis v. Kengla, 8 U. S. App. D. C. 230; 19 Am. Jur. sec. 503.

Another argument advanced is that the defendant has prevented full knowledge and disclosure of the fraud by refusing to make its records available to the minority stockholders. However, plaintiffs have made no convincing showing that the alleged fraud lies more fully exposed today than it was in 1896, or at the latest, in 1900, when the Hoover suit was filed. Certainly the processes of court were available to compel access to defendant's records, and all the other records were matters of public record. Contrarily, plaintiffs assert that nothing more is necessary to prove their claims than the records now before the Court. If this is true, then from the public records and from the defendant's own records, accessible through court process, plaintiffs could long ago have revealed the alleged fraud in its entirety. If more was necessary, then of necessity plaintiffs' proof must include the testimony of witnesses no longer alive. "[To] avoid the lapse of time or statute of limitations, the fraud must have been one which was concealed from the plaintiff by the defendant, or which was of such a character as necessarily implied concealment. Neither of these principles can apply to the defendants in this case. The acts which constituted the fraud as alleged in the bill were open and public acts. The note and the mortgage were recorded in the proper public office of the proper county. The possession of defendants was obtained by judicial proceedings which were
open to everybody's examination, and which were
1265 probably well known in the entire community."
Norris v. Haggin, supra, p. 392.

On the issue of fraud, plaintiffs are also confronted with a statement made by their late counsel in a letter of March 29, 1916:

"That a great wrong has been done them [minority stockholders] has always been believed in, but discovery of the breach of trust and of the perfidy of the fraud per-

petrated against them was not had until now, the facts having been most skillfully concealed from government officials, from the Court and from the public.'"[10]

It is difficult to understand plaintiffs' excuse that their delay was in part due to the problem they faced of persuading a court to set aside the decrees of 1896 which the defendant fraudulently fortified with the erroneous opinions of the two Attorneys General and judicial dicta. Plaintiffs' problem is no different today except that the array against them is much greater. Plaintiffs themselves were responsible for the opinions of the Attorneys General, and much of the other matter complained of resulted from their refusal to submit their claims to the courts. Their confidence in the courts comes only after fifty-four unsuccessful years elsewhere. This Court finds no substantial grounds for such neglect.

Before the Court also are the vast changes in the financial and physical structures of the Railway over the past fifty-four years. Its mileage has increased nearly 50%; property values have increased from approximately $300,000,000 to about $820,000,000; lines and equipment of other railroads have been acquired; stock and bond
1266 issues have been sold to the public on numerous occasions.[11] Granting the relief prayed for by the plaintiffs would create a concentric chaos affecting the rights and equities of thousands of stockholders and creditors, most of which were not even in existence at the time of the alleged fraud.[12] Where a plaintiff has been

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[10] Letter from Joseph P. McCullen, counsel for the committee, to Francis Lynde Stetson, attorney for the defendant Railway. Lishman deposition, p. 180, exhibit 100.

[11] Affidavit of John J. Leahy, statistician of Northern Pacific Railway Co., exhibit C of defendant's motion for summary judgment.

[12] The affidavit of Hugh McLeod, supra, Assistant Secretary of defendant, states the following comparison of common stockholders in the years 1896 and 1951: in 1896 there were 2800 stockholders holding 800,000 shares of common stock, while in 1951 there were 20,914 stockholders: Of the 20,914 stockholders in 1951, only two individuals and 31 firms were also stockholders in 1896. The two individuals held 7 shares in 1896 and 9 shares in 1951; the 31 firms held 34,638 shares in 1896 and 86,066 shares in 1951. These 31 firms are brokers and security dealers and are and have been at all times engaged in buying and selling securities for customers.

acquiescent while defendant has made great changes and expenditures of money, courts of equity have always refused to give relief. Hays v. Port of Seattle, et al., 251 U. S. 233; Patterson v. Hewitt, 195 U. S. 309.

Plaintiffs' counsel have presented a variety of additional arguments in opposition to the defendant's motion for summary judgment, supported by many citations which these counsel contend uphold their position. The Court has carefully considered the points thus raised and the cases cited. In the interest of brevity, the Court refrains from detailed discussion of these points, observing that it can find no ultimate support of plaintiffs' position due primarily and basically to substantial differences of facts between the present case and the cited cases.

Despite plaintiffs' strong appeal to equity, in consideration of the defendant's greatly changed position and
1267 the equities of innocent intervening parties, this Court must find that the alleged rights of the minority stockholders are buried in the grave created by their inexcusable lack of diligence in not sooner asserting these claims in the courts. Defendant's motion for summary judgment is granted.

The Court commends counsel on both sides for their able presentations and careful research which were of great help to the Court. Prevailing counsel will present the necessary order granting the motion for summary judgment.

EDWARD A. TAMM
Judge

Dated: June 23rd, 1954

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Opinion, per curiam, in Landell, et al. v. Northern Pac. Ry. Co., United States Court of Appeals for the District of Columbia Circuit, April 14, 1955.

Appellants, acting as a committee of minority stockholders of the Northern Pacific Railroad Company, a federal corporation organized and existing under an act

of Congress of July 2, 1864,[1] brought this civil action. The gravamen of the complaint was that a reorganization of the railroad in 1896 was illegal. Appellants said they had protested the reorganization continuously since that date. However that may be, they did not seek judicial remedy until they brought the present action in 1950.[2] In the District Court Judge Tamm, with a careful and exhaustive opinion,[3] concluded that the action was barred by *laches*. We agree and have nothing to add to his discussion of the matter.

Affirmed.

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[1] 13 Stat. 365.

[2] A suit was brought in the Southern District of New York in 1900 by one Hoover, not of appellants' committee. It was allowed to die for want of prosecution in 1939, and a motion to reinstate it was denied for inexcusable *laches*.

[3] Landell v. Northern Pac. Ry. Co., 122 F. Supp. 253 (D.C. D.C. 1954).

APPENDIX B

Statutes and Rule Involved

Act of July 2, 1864 (13 Stat. 365)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Richard D. Rice, John A. Poore, Samuel P. Strickland, Samuel C. Fessenden, Charles P. Kimball, Augustine Haines, Edwin R. W. Wiggin, Anson P. Morrill, Samuel J. Anderson, of Maine; Willard Sears, I. S. Withington, Josiah Perham, James M. Becket, A. W. Banfield, Abiel Abbott, John Newell, Austin L. Rogers, Nathaniel Greene, jnr., Oliver Frost, John A. Bass, John O. Bresbrey, George Shiverick, Edward Tyler, Filander J. Forristall, Ivory H. Pope, of Massachusetts; George Opdyke, Fairly Holmes, John Huggins, Philander Reed, George Briggs, Chauncy Vibbard, John C. Fremont, of New York; Ephraim Marsh, John P. Jackson, jr., of New Jersey; S. M. Felton, John Toy, O. J. Dickey, B. F. Archer, G. W. Cass, J. Edgar Thompson, John A. Green, of Pennsylvania; T. M. Allyn, Moses W. Wilson, Horace Whittaker, Ira Bliss, of Connecticut; Joseph A. Gilmore, Onslow Stearns, E. P. Emerson, Frederick Smyth, William E. Chandler, of New Hampshire; Cyrus Aldrich, H. M. Rice, John McKusick, H. C. Waite, Stephen Miller, of Minnesota; E. A. Chapin, John Gregory Smith, George Merrill, of Vermont; James Y. Smith, William S. Slater, Isaac H. Southwick, Earl P. Mason, of Rhode Island; Seth Fuller, William Kellogg, U. S. Grant, William B. Ogden, William G. Greene, Leonard Sweat, Henry W. Blodgett, Porter Sheldon, of Illinois; J. M. Winchell, Elsworth Cheesebrough, James S. Emery, of Kansas; Richard F. Perkins, Richard Chenery, Samuel Brannan, George Rowland, Henry Platt, of California; William F. Mercer, James W. Brownley, of Virginia; John H. B. Latrobe, W. Prescott Smith, of Maryland; Greenbury Slack, A. J. Boreman, of West Virginia; Thomas E. Bramlette, Frank Shorin, of Kentucky; John Brough, John A. Bingham,

Oran Follett, John Gardner, S. S. L'Hommedieu, Harrison G. Blake, Philo Chamberlin, of Ohio; John A. Duncan, Samuel M. Harrington, of Delaware; Thomas A. Morris, Jesse L. Williams, of Indiana; Samuel L. Case, Henry L. Hall, David H. Jerome, Thomas D. Gilbert, C. A. Trowbridge, of Michigan; Edward H. Broadhead, Alexander Mitchell, Benjamin Ferguson, Levi Sterling, — Marshall, of Wisconsin; J. C. Ainsworth, Orlando Humason, H. W. Corbett, Henry Failling, of Oregon; J. B. S. Todd, M. K. Armstrong, J. Shaw Gregory, J. Le Berge, of Dakota Territory; John Mullan, Anson G. Henry, S. D. Smith, Charles Terry, of Washington Territory; H. W. Starr, Platt Smith, Nixon Denton, William Leighton, B. F. Allen, Reuben Noble, John L. Davies, of Iowa; Willard P. Hall, George R. Smith, H. Gayle King, John C. Sargeant, of Missouri; William H. Wallace, of Idaho Territory; J. H. Lathrop, Henry D. Cooke, H. E. Merrick, of the District of Columbia, and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style, and title of the "Northern Pacific Railroad Company," and by that name shall have perpetual succession, and shall be able to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal. And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget's Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk-line at the most suitable place, not more than three hundred

miles from its western terminus; and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth. The capital stock of said company shall consist of one million shares of one hundred dollars each, which shall in all respects be deemed personal property, and shall be transferable in such manner as the by-laws of said corporation shall provide. The persons hereinbefore named are hereby appointed commissioners, and shall be called the board of commissioners of the "Northern Pacific Railroad Company," and fifteen shall constitu[t]e a quorum for the transaction of business. The first meeting of said board of commissioners shall be held at the Melodion hall, in the city of Boston, at such time as any five commissioners herein named from Massachusetts shall appoint, not more than three months after the passage of this act, notice of which shall be given by them to the other commissioners by publishing said notice in at least one daily newspaper in the cities of Boston, New York, Philadelphia, Cincinnati, Milwaukee, and Chicago, once a week at least four weeks previous to the day of meeting. Said board shall organize by the choice from its number of a president, vice-president, secretary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof as they may deem proper. The secretary shall be sworn to the faithful performance of his duties, and such oath shall be entered upon the records of the company, signed by him, and the oath verified thereon. The president and secretary of said board shall in like manner call all other meetings, naming the time and place thereof. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at such times, and in such principal cities or other places in the United States, as they, or a quorum of them, shall determine, within six months after the passage of this act, to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all sub-

scriptions, and to receipt therefor. So soon as twenty thousand shares shall in good faith be subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each state in which subscription books have been opened, at least fifteen days previous to the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by lawful proxy, then and there shall elect by ballot thirteen directors for said corporation; and in such election each share of said capital stock shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners, and, in case of their absence or inability, any two of the officers of said board, shall act as inspectors of said election, and shall certify under their hands the names of the directors elected at said meeting; and the said commissioners, treasurer, and secretary, shall then deliver over to said directors all the properties, subscription books, and other books in their possession, and thereupon the duties of said commissioners, and the officers previously appointed by them, shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. Annual meetings of the stockholders of the said corporation for the choice of officers (when they are to be chosen) and for the transaction of business shall be holden at such time and place and upon such notice as may be prescribed in the by-laws.

SEC. 2. *And be it further enacted,* That the right of way through the public lands be, and the same is hereby, granted to said "Northern Pacific Railroad Company", its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material

of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water-stations; and the right of way shall be exempt from taxation within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill.

SEC. 3. *And be it further enacted,* That there be, and hereby is, granted to the "Northern Pacific Railroad Company," its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate

sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided, further*, That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided, further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided, further*, That no money shall be drawn from the treasury of the United States to aid in the construction of the said "Northern Pacific Railroad."

SEC. 4. *And be it further enacted*, That whenever said "Northern Pacific Railroad Company" shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road;

and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: *Provided,* That not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: *Provided, also,* That lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act.

SEC. 5. *And be it further enacted,* That said Northern Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances, including furniture, and rolling stock, equal in all respects to railroads of the first class, when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line: *Provided,* That the said company shall not charge the government higher rates than they do individuals for like transportation and telegraphic service. And it shall be the duty of the Northern Pacific Railroad Company to permit any other railroad which shall be authorized to be built by the United States, or by the legislature of any territory or state in which the same may be situated, to

form running connections with it, on fair and equitable terms.

SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale.

SEC. 7. *And be it further enacted*, That the said "Northern Pacific Railroad Company" be, and is hereby, authorised and empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width two hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or

premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners, who may be appointed, upon application by either party, to any court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved at said appraisement may within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary and proper in the construction of its road. And said party appealing shall give bonds, with sufficient surety or sureties, for the payment of any cost that may arise upon such appeal; and in case the party appealing does not obtain a verdict, increasing or diminishing, as the case may be, the award of the commissioners, such party shall pay the whole cost incurred by the appellee, as well as his own, and the payment into court, for the use of the owner of said premises taken, of a sum equal to that finally awarded, shall be held to vest in said company the title of said land, and of the right to use and occupy the same for the construction, maintenance, and operation of said road. And in case any of the lands to be taken, as aforesaid, shall be held by any infant, femme covert, non compos, insane person, or persons residing without the territory within which the lands to be taken lie, or persons subjected to any legal disability, the court may ap-

point a guardian for any party under any disqualification, to appear in proper person, who shall give bonds, with sufficient surety or sureties, for the proper and faithful execution of his trust, and who may represent in court the person disqualified, as aforesaid, from appearing when the same proceedings shall be had in reference to the appraisement of the premises to be taken for the use of said company, and with the same effect as has been already described; and the title of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion, or remainder, the value of any such estate, less than a fee simple, shall be estimated and determined in the manner hereinbefore set forth. And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purposes of said railroad, and may institute proceedings, in manner described, for the purpose of ascertaining the value of, and of acquiring title to, the same; but the judge of the court hearing said suit shall determine the kind of notice to be served on such owner or owners, and he may in its discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claims to damages against said company shall be barred.

SEC. 8. *And be it further enacted,* That each and every grant, right, and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than

fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July anno Domini eighteen hundred and seventy-six.

SEC. 9. *And be it further enacted,* That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States, by its congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

SEC. 10. *And be it further enacted,* That all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription; and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the congress of the United States.

SEC. 11. *And be it further enacted,* That said Northern Pacific Railroad or any part thereof shall be a post route and a military road, subject to the use of the United States, for postal, military, naval, and all other government service, and also subject to such regulations as congress may impose restricting the charges for such government transportation.

SEC. 12. *And be it further enacted,* That the acceptance of the terms, conditions, and impositions of this act by the said Northern Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall

be made within two years after the passage of this act, and not afterwards, and shall be served on the President of the United States.

SEC. 13. *And be it further enacted,* That the directors of said company shall make an annual report of their proceedings and expenditures, verified by the affidavits of the president and at least six of the directors, and they shall, from time to time, fix, determine, and regulate the fares, tolls, and charges to be received and paid for transportation of persons and property on said road, or any part thereof.

SEC. 14. *And be it further enacted,* That the directors chosen in pursuance of the first section of this act shall, so soon as may be after their election, elect from their own number a president and vice-president; and said board of directors shall, from time to time, and so soon as may be after their election, choose a treasurer and secretary, who shall hold their offices at the will and pleasure of the board of directors. The treasurer and secretary shall give such bonds, with such security as the said board from time to time may require. The Secretary shall, before entering upon his duty, be sworn to the faithful discharge thereof, and said oath shall be made a matter of record upon the books of said corporation. No person shall be a director of said company unless he shall be a stockholder, and qualified to vote for directors at the election at which he shall be chosen.

SEC. 15. *And be it further enacted,* That the president, vice-president, and directors shall hold their offices for the period indicated in the by-laws of said company, not exceeding three years, respectively, and until others are chosen in their place, and qualified. In case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, the corporation shall not for that excuse be deemed to be dissolved, but such election may be holden on any day which shall be appointed by the directors. The directors,

of whom seven, including the president, shall be a quorum for the transaction of business, shall have full power to make and prescribe such by-laws, rules, and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate, and effects of the company, the transfer of shares, the duties and conduct of their officers and servants touching the election and meeting of the directors, and all matters whatsoever which may appertain to the concerns of said company; and the said board of directors may have full power to fill any vacancy or vacancies that may occur from any cause or causes from time to time in their said board. And the said board of directors shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching the location and construction of said road.

SEC. 16. *And be it further enacted,* That it shall be lawful for the directors of said company to require payment of the sum of ten per centum cash assessment upon all subscriptions received of all subscribers, and the balance thereof at such times and in such proportions and on such conditions as they shall deem to be necessary to complete the said road and telegraph line within the time in this act prescribed. Sixty days' previous notice shall be given of the payments required, and of the time and place of payment, by publishing a notice once a week in one daily newspaper in each of the cities of Boston, New York, Philadelphia, and Chicago; and in case any stockholder shall neglect or refuse to pay, in pursuance of such notice, the stock held by such person shall be forfeited absolutely to the use of the company, and also any payment or payments that shall have been made on account thereof, subject to the condition that the board of directors may allow the redemption on such terms as they may prescribe.

SEC. 17. *And be it further enacted,* That the said Company is authorized to accept to its own use any grant,

donation, loan, power, franchise, aid, or assistance which may be granted to, or conferred upon, said company by the congress of the United States, by the legislature of any state, or by any corporation, person, or persons; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use for the purpose aforesaid.

SEC. 18. *And be it further enacted,* That said Northern Pacific Railroad Company shall obtain the consent of the legislature of any state through which any portion of said railroad line may pass, previous to commencing the construction thereof; but said company may have the right to put on engineers and survey the route before obtaining the consent of the legislature.

SEC. 19. *And be it further enacted,* That unless said Northern Pacific Railroad Company shall obtain bona fide subscriptions to the stock of said company to the amount of two millions of dollars, with ten per centum paid within two years after the passage and approval of this act, it shall be null and void.

SEC. 20. *And be it further enacted,* That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act.

APPROVED, July 2, 1864.

Joint Resolution of May 31, 1870. (16 Stat. 370)

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to locate and construct, under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points: *Provided*,

that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgage lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder: *Provided further,* That in the construction of the said railroad, American iron or steel only shall be used, the same to be manufactured from American ores exclusively.

SEC. 2. *And be it further resolved,* That Congress may at any time alter or amend this joint resolution, having due regard to the rights of said company, and any other parties.

APPROVED, May 31, 1870.

Proviso in the Act of July 1, 1898. 30 Stat. 597, 620

And provided, further, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful suc

cessor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act, * * *.

Section 4, Act of June 25, 1929, c. 41, 46 Stat. 41

SEC. 4. The provisions of this Act shall not be construed as affecting the present title of the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, or any subsidiary of either or both, in the right of way of said road or lands actually used in good faith by the Northern Pacific Railway Company in the operation of said road.

Revised Statutes of Wisconsin for the Year 1878, As Amended By Ch. 260, 1880, Ch. 268, 1882, and Ch. 293, 1883

Section 1833. Any railroad corporation organized and existing under the laws of the territory or state of Wisconsin, or existing by consolidation of different railway companies under the laws of the territory or state of Wisconsin, and of any other territory or territories, state or states, may consolidate its stock, franchises and property with any other railroad corporation, whether within or without the state, when their respective railroads can be lawfully connected and operated together, to constitute one continuous main line, with or without branches, upon such terms as may be agreed upon, and become one corporation by any name selected, which within this state shall possess all the powers, franchises and immunities, including the right of further consolidations with other corporations under this section, and be subject to all the liabilities and restrictions of this chapter, and such in addition, including land grants and exemptions of land from taxation as such corporations peculiarly possessed or were subject to at the time of consolidation or amalgamation by the laws then in force applicable to them or either of them. Articles stating the terms of consolidation shall be approved by each corporation by a vote of the stockholders owning a majority of the stock in person or

by proxy, at either a regular annual meeting thereof or a special meeting called for that purpose, in the manner prescribed by section 1826, or by the consent in writing of such stockholders annexed to such articles; and a copy thereof, with a copy of the records of such approval, or such consent, and accompanied by lists of their stockholders, and the number of shares held by each, duly certified by their respective presidents and secretaries, with the respective corporate seals affixed of such corporations, shall be filed for record in the office of the secretary of state before any such consolidation shall have any validity or effect. Any such railroad corporation may lease or purchase, and take a conveyance or assignment of the railroad, franchises, immunities and all other property and appurtenances, and the stock or bonds thereof, of any other railroad corporation, or any portion thereof, within or without this state, when their respective railroads can be lawfully connected and operated together to constitute one continuous main line, or when the road so purchased will constitute branches or feeders of any road maintained and operated by such purchasing corporation. And any such railroad corporation may purchase and hold the stock or bonds of any railway company, to which it has furnished the money for the construction of its railway, or may purchase for the money so furnished, or for such other consideration as may be agreed upon between the companies by their respective boards of directors, and take a conveyance of the whole or any portion of the franchises of said corporation, and of the railway property and appurtenances thereof, and all acts, purchases, and conveyances heretofore made by any railway company of this state, which are authorized by this act, are hereby legalized, ratified and confirmed. But no railroad corporation shall consolidate with, or lease or purchase or in any way become owner of, or control any other railroad corporation, or any stock, franchises, rights or property thereof, which owns or controls a parallel and competing line, to be determined by jury.

Rule 56. Summary Judgment.

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not

in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX C

Excerpts From the Congressional Globe Reporting the Debates on the Resolution of May 31, 1870 (Page References Are to the Congressional Globe)

At the commencement of the debate in the Senate on February 28, 1870, the Congressional Globe briefly described the Resolution. The relevant portion of this description reads as follows (p. 1584):

> "* * * The Senate, as in Committee of the Whole, proceeded to consider the joint resolution (S. J. Res. 121) authorizing the Northern Pacific Railroad Co. to issue its bonds for the construction of its road, and to secure the same by mortgage. It proposes to authorize the Northern Pacific Railroad Co. to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and as proof and notice of its legal execution and effectual delivery, *the mortgage is* to be filed and recorded in the office of the Secretary of the Interior; and when so filed *is* to be deemed to be a good and sufficient conveyance of all the rights and property of the company as therein expressed; * * *." (Emphasis supplied.)

On April 7, 1870, the Chairman of the Senate Committee on the Pacific Railroad, Senator Howard, said in the course of debate (pp. 2492, 2493-4):

> "The company are now anxious to issue their mortgage bonds for the purpose of raising money to complete this road. The value of those bonds will depend upon the value of the lands on which they rest, and upon the value of the line of road and the franchise, which will also be included in *the mortgage*. Capitalists who lend money are very apt to look sharply into the nature of the securities which are tendered to

them for the repayment of the money. A capitalist understands perfectly well what is meant by a donation of alternate sections of land to a railroad company. He knows that the title of the United States is granted to the company, and that *the mortgage* upon which he lends money *is* upheld and supported by that title in fee-simple to the lands granted. He knows that when he or his trustee forecloses *the mortgage* under which he lends the money the sale of the lands will be also in fee-simple, and that the amount of money to be obtained upon a mortgage sale will be greater as the title which is given to the purchaser is clearer and stronger.

* * * *

"What I said was this: That if these lands, which are to be sold at a maximum of $2.50, found their way into *the mortgage,* that would be a circumstance to affect the character of *the mortgage* and the credit of *the mortgage,* and of course it would be some slight embarrassment in the negotiation of the mortgage bonds; because it will be impairing the value of the land so far forth to reduce the price if the market price of the land was higher than $2.50." (Emphasis supplied.)

On April 9, 1870, Senator Howard said (p. 2545):

"Speaking of the mortgage which it is contemplated to issue, the resolution says:

"'And as proof and notice of its legal execution and effectual delivery, *said mortgage* shall be filed and recorded in the office of the Secretary of the Interior, and when so filed, shall be deemed to be a good and sufficient conveyance of all the rights and property of said company as therein expressed'.

"He intimated on Thursday that it would be a strictly legal construction of this statute if the company should include in its mortgage lands which should lie entirely

without the range of the alternate sections, lands that might lie anywhere and everywhere, provided they belong to the United States, and that such lands would be subject to the operation of *this mortgage*. Do I misstate the Senator?" (Emphasis supplied.)

On April 20, 1870, Senator Howard said (p. 2845):

"It is easy to see that this amendment would have a very injurious effect on *the mortgage* which it is proposed to execute on these lands." (Emphasis supplied.)

Senator Thurman, a leading opponent of the legislation, understood the Joint Resolution in the same way. In discussing the proposal in the Senate on April 11, 1870, he said (p. 2570):

"Now, sir, what is it that they ask? They ask that Congress shall authorize them to make *a mortgage*, not simply upon the road, but upon every dollar's worth of property, real, personal, or mixed, that they own; and not only that, but upon their corporate franchises and franchise of being a corporation. If that mortgage is given—*a mortgage* given before there is one single shovelful of earth dug out, before there is anything done whatever; *a mortgage* put upon this road without any limitation whatsoever as to the price for which the bonds may sell—what, I ask, will be the ultimate fate of the road under such *a mortgage—a mortgage* unlimited in amount under which $200,000,000 of bonds may be put upon the market without any limitation whatsoever as to the price for which they shall sell or the interest which they shall bear? Does not any man who has the least experience in the history of railroads in this country know that there can be but one outcome to *such a mortgage* as that, and that is the sale of all this property under *that mortgage* and its purchase by a ring

in the company itself? That is the common history of railroads—the sale of everything under *this mortgage* and a purchase by a ring among the stockholders themselves. That is to be the long and the short of it.

"After the profits that shall have resulted from manipulating the bonds, after the commission that shall have been paid to some banker or broker, perhaps an interested individual in the concern, after he shall have squeezed the orange and got all he can get out of it, in the end the whole thing will go to sale under *the mortgage*, and all the property belonging to this company and given to it by the Government will become the property of a ring in the corporation itself, and freed from its liabilities because sold under the prior lien of *the mortgage*. Then those who are creditors to that company, then those to whom it has become indebted, may whistle for their pay. This ring will have the road and all its property under the prior lien of *the mortgage*, and the stockholders who are not in the ring and the creditors who are not secured by the mortgage may whistle for their pay." (Emphasis supplied.)

Senator Pomeroy, another opponent, understood it similarly. On the same occasion he said (p. 2577):

"If you mortgage a lot of land it is liable to slip away into the hands of the settlers from time to time, so that when that security comes to be applied for there is no land there, then you have no security; and on that account I say that for *this mortgage which is authorized* the land should be secured beyond a peradventure of diminution, so that the number of acres existing and due the company at the time *the mortgage is put on* can not be diminished." (Emphasis supplied.)

At the commencement of the debate in the House on May 5, 1870, the Congressional Globe described the Resolution as follows (p. 3263):

> "It authorizes the Northern Pacific Railroad Co. to issue its bonds to aid in the construction and equipment of its road and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and provides that, as proof and notice of its legal execution and effectual delivery, *said mortgage* shall be filed and recorded in the office of the Secretary of the Interior." (Emphasis supplied.)

Congressman Wheeler, Chairman of the House Committee on the Pacific Railroad, in orally reporting the Resolution to the House on that same day, said (p. 3263):

> "The company is not here today to ask for money or enlarged subsidies in lands. It seeks by this legislation three things.
>
> "First, it wants to put the national impress upon its *mortgage* by recording and filing *it* in the office of the Secretary of the Interior." (Emphasis supplied.)

On May 25, 1870, Congressman Wheeler said (p. 3793):

> "Another objection, upon which repeated changes have been rung, is as to *the mortgage* which this company is allowed to issue. Mr. Speaker, I take it we are not here to legislate brains into the heads of the money lenders of this or foreign countries. A man who knows enough to accumulate money is generally sharp enough to look out for his own security when he loans it. We are told here in a general way by gentlemen that this joint resolution permits this company to mortgage all this land. Sir, that is simply absurd. This joint resolution permits the company

to secure its bonds by *a mortgage* on 'its property and rights of property of all kinds and descriptions, real, personal, and mixed.' " (Emphasis supplied.)

Congressman Ela, an opponent of the legislation, understood the Resolution in this same way. On May 5, 1870, he said (p. 3268):

"I hope the House will not sustain the call for the previous question on this joint resolution without giving us an opportunity to look into it and see what is in it. Now, sir, what is this proposition. Why, sir, it is practically a proposition to enable this corporation to go into the money market of the world to borrow money with *a mortgage* upon 47,000,000 acres of land, in competition with the Government which has nothing but the public faith of the people to guaranty it in what it may want to borrow, and to be damaged by the chance of Democratic successes, if these plunder schemes are to be put through a Republican Congress." (Emphasis supplied.)

On May 25, 1870, Mr. Ela said (p. 3789):

"Why, Mr. Speaker, if this corporation can not build its road by the subscriptions to its stock, but has to mortgage its lands to the moneyed powers of Europe, and if the road has got to be built by *a mortgage* to those powers, I ask if it is not better that the United States Government shall mortgage its lands itself to build the road and own the road when completed, which is to be between seventeen and eighteen hundred miles long, instead of giving it to a corporation, without their having contributed a dollar from their own pockets to build it?" (Emphasis supplied.)

APPENDIX D

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,428

GEORGE A. LANDELL, Executor *et al*, *Petitioners*,

v.

NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.

Appeal From Summary Judgment of the United States District Court for the District of Columbia

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PETITION FOR REHEARING BEFORE THE FULL COURT, OR IN THE ALTERNATIVE, FOR MODIFICATION OF OPINION

Petitioners respectfully request the Court for a rehearing of the instant case before the full Court, sitting *en banc*, or, in the alternative, for modification of the *Per Curiam* opinion herein, dated April 14, 1955 and, as grounds therefor, state as follows:

I.

The District Court, whose decision was affirmed by this Court, failed to accept the allegations in the complaint and relied upon papers not in evidence and not properly considered upon motion for summary judgment. That Court, therefore, erroneously concluded that the complaint was founded upon an ancient and concealed private, commercial, fraud fully consummated in 1896.

II.

We believe that this Court, unaware that the District Court had failed to accept the fundamental allegations of the complaint as it was required to do, has misinterpreted the cause of action stated in the complaint. The gravamen of the complaint is not "that a reorganization of the railroad in 1896 was illegal". It is (a) that petitioners derive their rights from an existing statutory contract now being violated, to which the federal government, the captive Northern Pacific Railroad Company, and petitioners, are parties; (b) that respondent, through fraud upon the court and systematic abuse of the judicial process, has usurped and misappropriated petitioner's 3% statutory share of the continuing franchises and assets provided in such statutory contract; and (c) that the government and respondent, through the use as final and conclusive upon petitioners of certain consent decrees procured by fraud upon a court and of adjudications of courts and opinions of Attorneys General upon collateral matters, have effectively prevented, until now, the presentation of petitioners' case to the courts.

III.

We respectfully insist that the proper administration of justice requires that this Court consider and deal in its opinion with the serious charges of respondent's fraud upon the court and systematic, continuing misuse of the judicial process to accomplish and maintain its illegal seizure of the 43,000,000 acre land grant, 2500 mile right of way, and railroad franchises vested by Congress in Northern Pacific Railroad Company, the federal corporation, in which petitioners are stockholders.

IV.

The District Court's opinion ignores the reservation of decision in United States v. Northern Pacific Railway Co. (311 U.S. 317, 342, 61 S. Ct. 264, 276) as to the validity of respondent's succession to the federal corporation.

DISCUSSION OF GROUNDS FOR PETITION

I.

The District Court's Failure to Accept the Allegations of the Complaint and Its Reliance Upon Papers Not in Evidence.

Judge Tamm's opinion relies upon and refers to Exhibits of respondent which were nothing more than exhibits for identification on the deposition of one of the petitioners. (See 122 F. Supp. at pp. 254, 255, 257, 258, 259). These are papers selected for printing by respondent's counsel and marked as "Defendant's Exhibit No. ... for identification" (Transcript pp. 430, 638, 417, 447, 588). None has been placed in evidence or tested by the rules of evidence. These selected papers marked for identification are relied upon by the District Court to reject the allegations in the complaint. We submit that they merely reflect the views of respondent's counsel of what material might best be used to divert attention from the real cause of action set forth in the complaint. Such views are irrelevant and immaterial to this case. They are, by no conceivable construction, admissible as a basis for Summary Judgment under Rule 56 of the Rules of Civil Procedure.

Petitioners did not, unfortunately, discuss this point in briefs or oral argument before this Court. Petitioners, however, moved this Court under date of October 27, 1954 to exclude from printing in the appendix more than 500 pages of transcript designated by the appellee, respondent Rail*way* herein. Among these 500 pages were the exhibits for identification relied upon by the District Court as a basis for its opinion. The motion to exclude was denied November 19, 1954 after oral hearing before a panel of three judges of this Court.

The basic reasons for exclusion advanced in the motion were that:

> (a) To include same in the record would "unnecessarily burden the Court and hinder its consideration of this case" and

(b) "Included in the transcript record are *2,971 pages, all marked as defendant's exhibits for identification* on the Lishman deposition. More than 2,500 of such pages are copies of printed briefs, records and opinions in other cases handled by attorneys who had been dismissed as counsel for plaintiff committee long prior to the filing of the present complaint."

"The appellants, in one of the affidavits submitted to the District Court (Tr. 831-832), requested the Court to exclude from the record 1,705 pages of such material. It was shown to the District Court that such 1,705 printed pages marked by defendant for identification had not been vouched for as correct, accurate or complete or shown to be relevant or competent and to admit them would 'unnecessarily burden the record with excessive material'. This objection was repeated in plaintiffs' points and authorities (Tr. 992). The District Court did not rule on this objection."

Petitioner's motion also informed this Court:

"The basic purpose of the additional 500 transcript pages designated by appellee is to support its claim that appellants' rights under a federal statute (the Act of July 2, 1864) have been extinguished by the passage of time, coupled with alleged knowledge on the part of appellants of the essential facts. By this approach, appellee would in effect have the court vary the express terms of the federal statute giving appellants, as stockholders in the federal corporation, rights in perpetuity. *Since the material in question is not properly before the Court on motion for summary judgment, it is not proper that it be printed in the Joint Appendix, thus adding unnecessary confusion and difficulty to the disposition of this case.*" (Emphasis supplied. See, Appellants' App. 193-194).

This Court in its order denying respondent's motion, indicated that each party might file a separate printed appendix. The Court did not, however, rule on the admissibility of any of defendant's exhibits marked for identification.

It is contrary to due process of law for the District Court to use as evidence against petitioners, material selected and caused to be marked for identification by respondent's counsel, never tested in any way under the rules of law and evidence, and inadmissible on a motion for summary judgment under Rule 56.

By devoting its briefs and arguments before this Court and the District Court *not to the allegations in the complaint*, but to the 2,971 pages of "exhibits" it had caused to be marked for identification upon the taking of the deposition, respondent has succeeded in smothering the factual allegations that it is breaching a federal statutory contract and is guilty of misusing the judicial process, all to the injury of petitioners. It advised Judge Tamm that it was "not in order" for him to consider such allegations. (Main brief, pp. 36, 17). Judge Tamm's opinion shows that he followed this advice.

The District Court in its opinion uses "Defendants Exhibit No. 100 for identification" to describe petitioners' cause of action as one of a skillfully concealed fraud (122 F. Supp. at p. 259). There is no allegation of concealed fraud in the complaint. That is not the basis or theory of this case as the discussion under Point II hereof shows. (See also Lishman deposition, Tr. 563, 578, where it is testified that the complaint is *not* based upon any fraud, *except the fraud upon the court*). The District Court's use of a 1916 lawyer's letter marked for identification as a basis for characterizing the cause of action rather than going to the complaint itself is utterly unfounded.[1]

Respondent in its brief and argument has cited no law and no case giving it authority to operate Northern Pacific's

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[1] The serious errors of fact in Judge Tamm's opinion have already been called to this Court's attention (Reply brief pp. 5, 9). This Court's attention was also called to the affirmative misrepresentation of fact in respondent's brief herein (See Petitioner's reply brief pp. 2-4 and Tr. 458, Appellants' App. 8). The fact that the *Hoover* case opinion, relied upon by Judge Tamm and by this Court, was obtained by suppression of records by both parties has also been pointed out (Main brief pp. 16, 38, reply brief pp. 5, 10, Tr. 146, 910).

main transcontinental line of railroad. Judge Tamm's opinion makes no mention of the lack of such authority and contains no discussion of the statutory contract (See Point II below).[2]

II.

The Cause of Action as Stated in the Complaint.

(a) *The statutory contract.*

It is settled law that railroad land grants result in contracts and that the Act of July 2, 1864 is such a contract and is binding upon respondent herein. *Northern Pacific Railway Co.* v. *U. S.*, 320 U.S. 248, 67 S. Ct. 747, 752; *Burke* v. *Southern Pacific R. Co.*, 234 U.S. 669, 680, 34 S. Ct. 907, 911.

The complaint pleads the statutory contract upon which petitioners rely, viz, the Act of July 2, 1864. It is pleaded in the complaint that the Northern Pacific Rail*road* Company duly filed its written acceptance with the President of the United States of the covenants provided in such Act and that petitioners duly accepted the offer contained in the statute by subscribing to the stock of Rail*road*. (Appellants App. 12-14).

Respondent as 97% stockholder in the federal corporation (which is party to this statutory contract), claims all the benefits of such contract, while denying any of such benefits to petitioners, who are holders of 3% of the stock in that corporation. Yet both the 97% and the 3% interests derive from a common source—the Act of July 2, 1864.

It is pleaded that respondent has and is *today* violating the terms of the statutory contract and has facilitated its violations by fraud on the Court and continuing misuse of the judicial process. The underlying facts to support these allegations are pleaded in detail.

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[2] We emphasize herein the contractual nature of the statutory authorization for the Northern Pacific Rail*road* Company since that aspect of such authorization was, apparently, not sufficiently covered in our briefs.

It is further alleged in the complaint that this statutory contract by its own terms is non-assignable.[3]

The statutory contract provides, as pleaded, that it may be altered, amended, or repealed by only one of the parties thereto—Congress. The complaint alleges that respondent, in 1896, prior to the foreclosure sale of that year, applied to Congress for an amendment of the Act of July 2, 1864, to permit respondent, as 97% stockholder, to be substituted for Northern Pacific Rail*road* Company, the federal corporation. Congress expressly refused such substitution and has never authorized it. In *Humbird* v. *Avery*, 195 U.S. 480, 25 S. Ct. 123, the Court pointed out that *Congress had passed legislation expressly refusing to recognize* Rail*way* as successor to Rail*road*. (25 S. Ct. at 126, 132).

Recognizing that the real party in interest is the federal corporation, respondent keeps alive such corporation and its 97% stock interest therein. All its mortgages contain the extraordinary provision that it may, at any time, reconvey the mortgaged property back to the federal corporation without the consent of the mortgage trustee. It is so pleaded in the complaint.

We have considered at length in our briefs the proposition that laches cannot invalidate rights based upon a statutory contract. We refer the Court especially to *District of Columbia* v. *Thompson Co.*, 346 U.S. 100, 114, 73 S. Ct. 1007, 1014, where the Supreme Court stated: "The failure of the executive branch to enforce a law does not result in its modification or repeal—the repeal of laws is as much a legislative function as their enactment." See also, *Oregon & California R. Co.* v. *U. S.*, 238 U.S. 393, 35 S. Ct. 908, 922, 925.

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[3] Authorities establishing the non-assignability of the contract and of railroad franchises are cited in our main brief pp. 22, 25, 28-30. Acceptance of the pleading (Appellants' App. 33, Tr. 157) that the statutory contract is non-assignable would have eliminated the present costly appeal and the printing of hundreds of pages of material never admitted in evidence or ruled upon.

(b) *Fraud upon the Court.*

After Congress had refused to amend the statutory contract, and while it held 97% of Rail*road*'s stock, respondent, in circumvention of the law and by fraud upon the Wisconsin federal court (Appellant's App. pp. 35, 60, 72, main brief pp. 34-38), procured a consent foreclosure decree in its favor against Rail*road* in proceedings to which neither the United States nor petitioners were parties. Also by fraud upon the court respondent procured a consent, sequestration deficiency judgment against the federal corporation. It has used and is using these decrees to prevent the 3% minority from vindicating their statutory contract interest (Appellants' App. 72, 69, 8, 27, 33, 37-39, 42). In the present case, notwithstanding the determination in *Northern Pacific Railway Co.* v. *Boyd,* 228 U.S. 482, 33 S. Ct. 554, that these decrees are void as to non-parties, respondent imposes them upon this Court as *res adjudicata* against the petitioners. (Answer, Appellants' App. 106, 107, 119).

No court or public official has ever adjudicated petitioner's claims. Rulings by attorneys general that these claims must not be heard because they were attempts at collateral attack upon decrees which were final and conclusive, are obviously not rulings that the claims have no substance or merit.

(c) *Respondent's Systematic, Past and Present Misuse of the Judicial Process.*

Respondent has persuaded public officials that the consent decrees it procured by fraud upon the Wisconsin federal court are conclusive adjudications that it has succeeded to Rail*road's* franchises, land grant and other assets. The Attorney General has accepted these decrees as not subject to collateral attack. In government suits against Rail*way* and Rail*road* the Attorney General has alleged in bills of complaint that by these decrees Rail*way* has lawfully succeeded to Rail*road,* the federal corporation. In these suits Rail*way* has filed answers, and has caused its captive

Rail*road* to file answers *admitting* the truth of the allegations in the government's complaint that Rail*way* lawfully succeeded to Rail*road* under and by virtue of said decrees.[4] (122 F. Supp. at p. 257, Appellants' App. 189).

The Supreme Court was unaware that the pleadings before it were erroneous. Respondent thus secured the advantage of having that Court treat as conclusive, decrees which were void, having been obtained by a fraud upon a Court. In certain cases the Court has referred to Rail*way* as the "successor" to Rail*road*.

Rail*way*, respondent herein, unconscionably, and to the past and present prejudice of petitioners, used and uses the Supreme Court statements thus obtained, as conclusive adjudications against petitioners. Respondent pleads these statements as *res adjudicata* upon the question of its succession to Rail*road*. *Respondent has made this misleading use of Supreme Court statements before this Court and even before the Supreme Court itself.* (Reply brief p. 8, Appellants' App. 189).[5]

It is pertinent to emphasize to this Court that the District Court was persuaded to use against the petitioners certain opinions of Attorneys General which had been overruled in *Northern Pacific Railway Company* v. *Boyd*, 228 U.S. 482, 33 S. Ct. 554. As we have stated, that case held that the decrees relied upon as conclusive by the Attorney General and by respondent were void as to non-parties. (Tr. 196)

Respondent's improper use of court cases and opinions of Attorneys General as conclusive adjudications, taken together with the part played by the government, has

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[4] Rail*way* also currently causes Rail*road* to execute deeds and other papers attesting that Rail*way* is its lawful successor and thus continues its uninterrupted misappropriation of Rail*road*'s assets. (Appellants' App. 34).

[5] Petitioners' Points and Authorities quoted extensively some of these pleadings as taken from the records filed in the Supreme Court, Tr. 998-1000, See, also Tr. 174, 189, 1112. Respondent's reply brief in the District Court refused to discuss, these facts of record alleged in the complaint. Respondent's reply brief persuaded the District Court that "discussion of . . . those questions is not in order." (Tr. 1053).

effectively deterred, until now, the prosecution of petitioners' claims. This systematic misuse of the judicial process and its deterrent affect upon the institution of litigation, is pleaded in the complaint and must be accepted as true upon a motion for summary judgment. (Appellants' App. pp. 72, 69).

It was manifest error for the District Court to refuse to accept these important facts pleaded in the complaint and to rule that these basic allegations were only "plausible argument". (122 F. Supp. at 255)

III.

We Respectfully Insist That the Proper Administration of Justice Requires That This Court Consider and Deal in Its Opinion With the Serious Charges of Fraud Upon the Court and Misuse of the Judicial Process, to Petitioners' Detriment, Which Are Made in the Complaint Herein and Supported by Affidavit and by Facts of Record Before the Supreme Court.

The authorities collected in our main brief pp. 34-37 show, we submit, that this Court is under a duty to inquire into the allegations in the complaint and petitioners' affidavit filed herein that respondent has been guilty of a fraud upon the court and misuse of the judicial process to the injury of the petitioners. These are not idle charges. They are based upon allegations in the complaint and facts of record in this case and facts of record in Supreme Court cases, detailed references to which are contained in our briefs. We believe that unless this Court makes due inquiry herein, the true administration of justice will be impaired. The violator of a statutory contract will be permitted to deprive citizens of property vested in them by the clear provisions of an existing statutory contract and to unjustly enrich itself thereby. Under the Constitution, Congress itself could not confiscate these statutory property interests except for a public purpose and upon payment of just compensation.

IV.

The District Court's Opinion Ignores the Reservation of Decision in United States v. Northern Pacific Railway Co. (311 U.S. 317, 342, 61 S. Ct. 264, 276) as to the Validity of Respondent's Succession to the Federal Corporation

In *Northern Pacific Railway Co.* v. *United States,* the Supreme Court made an extraordinary reservation in its decision—a reservation as to the validity, among other things, of the legality of Rail*way's* right to succeed to Rail*road's* interest. (Appellants' App., 192, 193, See Tr. 994). This the Court did despite the fact that, in his oral argument in the Supreme Court in that case, the attorney for the United States stated that the United States did not question the right of the Northern Pacific Rail*way* Company to act as the lawful successor of the Northern Pacific Rail*road* Company, although the question had not been presented to the Court below for decision and no testimony was ever taken before the master or before the Court in support of Rail*way's* claim to be such successor. Judge Tamm's "particular attention" was called to this reservation. (Tr. 194, 123).

If the instant case should be remanded for trial (which we regard as unnecessary) we propose to ask respondent's counsel for an admission, under Rule 36 of the Rules of Civil Procedure, that counsel for Rail*way* in his oral argument before the Supreme Court in *Northern Pacific Railway Company* v. *United States,* 311 U.S. 317, stated that the Reorganization Managers of Northern Pacific Rail*road* Company had acquired the bonds and all the stock of Rail*road* and that thereupon in consummation of the 1896 plan of reorganization, the bonds, and all of the stock of Rail*road,* had been exchanged for bonds and stocks of Northern Pacific Rail*way* Company. In fact, of course, petitioners' 3% interest had not been acquired.

We suggest that, had the Supreme Court known that unacquired shares of a dissident minority were outstanding, it would have had even graver doubts of the validity of

Railway's title than those which presumably caused the reservation of its decision on that point. Among the nine Justices now composing the Supreme Court, four were sitting at the time of the aforesaid oral argument.

CONCLUSION

In 1947, as we have shown under Point II hereof, the Supreme Court held that respondent, Railway, is still bound by the statutory covenants in the Act of July 2, 1865, so far as the government is concerned. Yet this Court now rules that covenants in the same statutory contract are not binding upon the respondent, so far as the petitioners are concerned.

This, we submit, is not equal justice under law. If the respondent's claim is correct, which we deny (See, Point V of our main brief), that to grant relief to petitioners may injure innocent third persons, then respondent should appeal to Congress, the contract and statutory source for relief, and not to the courts. Congress is the party to the contract which has the sole power to amend. Certainly this Court, under the guise of laches invoked by a wrongdoer should not undertake to amend or to annul the statutory covenants between Congress and these petitioners. Whether these covenants are wise or have outlived their usefulness, is not a matter for the judgment of this Court.

Congress covenanted that the petitioners would have a continuing 3% interest in the non-assignable railroad operating franchise and right of way through 2500 miles of the federal public domain.

Congress did not provide that the benefits of the franchises, right of way, land grant and covenants would run to only 97% of the people of the United States who accepted the statutory offer.

Congress did not provide that the benefits and the covenants would be permanent so far as the government is concerned, but only temporary, so far as the 3% minority are concerned.

Congress, when asked by respondent to amend the contract in the foregoing respects, refused to do so. Congress has refused respondent's requests to be substituted for the federal corporation. (Appellants' App. 33).

Under any rule of law, this Court should not undertake to sanction respondent's attempt to vary, through the use of material not in evidence, the clear terms of the statutory contract.

The foregoing basic matters, pleaded with factual detail in the complaint, and briefed with thoroughness, made no impression upon the District Court. Its opinion discusses, with no reference to the statute, a cause of action not presented in the complaint.

In the light of these facts we submit that this Court should reverse its affirmance and adoption of the District Court's opinion and recognize, at the least, that the view of the nature of petitioners' cause of action taken by Judge McLaughlin, who accepted the allegations of the complaint, is the true law of this case.

WHEREFORE, it is respectfully prayed that this Honorable Court set this case down for rehearing before the full Court sitting *en banc*, or, in the alternative, that it set aside the summary judgment in favor of the respondent and award judgment to petitioners, or enter such other and different decree herein as to this Court seems necessary and appropriate.

Respectfully submitted,

ROBERT W. LISHMAN,
Attorney for Petitioners,
412 Washington Building,
Washington 5, D. C.

Of Counsel:

EDWARD BROWN WILLIAMS

Certificate of Good Faith

I, Robert W. Lishman, counsel for petitioners in the above-entitled case, hereby certify that this foregoing petition is presented in good faith and not for delay.

ROBERT W. LISHMAN.

April 28, 1955.

Certificate of Service

It is hereby certified that three copies each of the Petition for Rehearing were forwarded by first class mail, postage prepaid, to Bernard G. Ostmann, Esquire, Transportation Building, Washington 6, D. C., attorney for respondent, this twenty-eighth day of April, 1955.

ROBERT W. LISHMAN,
Attorney for Petitioners,
412 Washington Building,
Washington 5, D. C.

FILED
SEP 6 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 299

GEORGE A. LANDELL, *et al.*,
Petitioners,

v.

NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

PORTER R. CHANDLER,
15 Broad Street,
New York 5, N. Y.
Counsel for Respondent.

M. L. COUNTRYMAN, JR.,
176 E. Fifth Street,
St. Paul 1, Minnesota.

BERNARD G. OSTMANN,
Transportation Building,
Washington 6, D. C.

WILLIAM A. KAYNOR,
15 Broad Street,
New York 5, N. Y.
Of Counsel.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Question Presented.

Petitioners, minority stockholders of Northern Pacific Rail*road* Company, commenced this action in 1950, attacking as illegal mortgages placed on the Rail*road's* properties between 1879 and 1889 and a reorganization and foreclosure of those mortgages carried out under court decrees between 1896 and 1899, pursuant to which the Rail*road's* properties were transferred to Northern Pacific Rail*way* Company. On motion for summary judgment below, it was established by undisputed documentary evidence coming largely from

petitioners' own files: (a) that petitioners or their predecessors had declined an offer to participate in the reorganization upon the same terms as all other stockholders, (b) that petitioners or their predecessors had knowledge or notice, for at least 50 years before this action was brought, of the facts and legal theories upon which their present claims are based, and had repeatedly and ineffectually pressed their "public interest" arguments upon the Executive and the Congress, (c) that similar prior litigation begun in 1900 was dismissed for lack of prosecution in 1939, (d) that every participant in the transaction has long since died and (e) that the position of respondent, its creditors and its stockholders and the properties of respondent have changed almost beyond recognition in the intervening half century.

In the opinion of respondent the sole question is whether under these circumstances petitioners are barred by (1) laches or (2) the statute of limitations.

Both courts below held—we submit correctly—that the action should be dismissed for laches, and found it unnecessary to consider the question of limitations.

Statement.

The substance of the complaint (App. 2-77*) is that mortgages placed on the Northern Pacific Railroad's property between 1879 and 1889 and aggregating more than $100,000,000 were illegal and void, and that the 1896 reorganization and foreclosure of those mortgages under which the Railroad's properties passed into the ownership and

* Petitioners' appendix in the Court of Appeals is numbered from page 1 to 270. Respondent's appendix in that Court is numbered consecutively, starting at page 271. Citations to both appendices will be in the form of App. ..... herein.

possession of the Railway, were likewise illegal and void. The prayer is for a declaration of nullity, a restoration of the properties, and an accounting.

Defendant Railway first moved to dismiss the complaint on the grounds of (i) absence of a necessary party (the old Railroad), (ii) improper venue and (iii) invalidity of service of process in the District of Columbia. When this motion was denied by Judge McLaughlin (98 F. Supp. 479; App. A to petition, p. 1a) the Railway answered the complaint and took the deposition of the principal plaintiff Robert W. Lishman, who is also of counsel for petitioners. In connection with his deposition there were marked as exhibits a number of documents coming chiefly from petitioners' files. On the basis of that deposition, those documents and three affidavits establishing (a) the death of all concerned in the original transactions and (b) the substantial changes which have occurred in the Railway's position and properties since 1896, the Railway moved for summary judgment under Rule 56 on the ground of (1) statute of limitations and (2) laches.

The District Court in a careful opinion (122 F. Supp. 253, App. A to Petition, pp. 8a, 17a) held:

> "Granting the relief prayed for by the plaintiffs would create a concentric chaos affecting the rights and equities of thousands of stockholders and creditors, most of whom were not even in existence at the time of the alleged fraud. • • •
>
> This Court must find that the alleged rights of the minority stockholders are buried in the grave created by their inexcusable lack of diligence in not sooner asserting these claims in the courts."

The District Court accordingly dismissed the complaint for laches and found it unnecessary to pass upon the ques-

tion of limitations. The Court of Appeals affirmed per curiam (223 F. 2d 316, App. A to Petition, p. 18a) on the basis of the District Court's opinion.

Background of the Litigation.

The Northern Pacific Rail*road* Company was chartered by the Act of July 2, 1864 (13 Stat. 365, App. 198). Its early history is summarized by Mr. Justice Roberts in *United States* v. *Northern Pacific Railway Co.*, 311 U. S. 317, 324-328 (1940). The original Act permitted only public subscriptions to stock and prohibited the issue of mortgage bonds without the consent of Congress. When it became apparent that sufficient funds could not be raised in that way, Congress duly gave its consent to the issuance of bonds and the right to "secure the same by mortgage on its [the Railroad's] property and rights of property of all kinds and descriptions * * * including its franchise as a corporation." * A bond issue of $30,000,000 was floated in 1870. During the panic of 1873 the Railroad became insolvent; and by a reorganization in 1875 this bond issue was paid off in preferred stock (App. 16-17). With the help of subsequent mortgage bond issues (i.e. those now attacked as void) the Railroad was finally completed in the 1880's.

A short period of relative prosperity followed; but in the panic of 1893 the Railroad was again unable to meet payments on some of its bond issues. A decision of four Supreme Court Justices (*Farmers' Loan & Trust Co.* v. *Northern Pacific R.R.*, 72 Fed. 26 (1896)) resolved conflicting applications for receivership and fixed primary jurisdiction in the Circuit Court for the Eastern District

* Joint Resolutions of March 1, 1869, and May 31, 1870, 15 Stat. 346 and 16 Stat. 378; see App. 212-214.

of Wisconsin. Pursuant to foreclosure proceedings which followed in that Court, the present Northern Pacific Rail*way* Company "acquired title to the railroad, the land grant, and all other property of the original corporation and has since operated the road and obtained patents for millions of acres under the land grants." (*U. S.* v. *Northern Pacific Railway Co.*, 311 U. S. at 328).

During the receivership protracted negotiations were carried on by representatives of the stockholders and bondholders to develop some plan of reorganization which would scale down fixed charges to accord with income and at the same time preserve so far as possible their relative rights. Such a plan was finally agreed on and publicly presented to all the Railroad's security holders in March 1896 (App. 7-8, 23, 385; Def. Ex. 4, App. 295, 408). It provided for the acquisition by J. P. Morgan & Co., as reorganization managers, of substantially all the outstanding stock and bonds of the Rail*road* in exchange for securities of the successor corporation—Northern Pacific Rail*way* Company—and the use of the old securities as the medium of payment for the purchase at judicial sale of all the properties (whether or not covered by mortgage) of the Rail*road*.

So far as the stockholders were concerned, the conditions of participation, which were open to all (App. 7; Def. Ex. 4, App. 295, 408), provided for the exchange share for share of old Rail*road* stock for new Rail*way* stock upon payment of $10 for each share of preferred and $15 for each share of common. Substantially all the bondholders, and over 95% of the stockholders, joined in the plan. The predecessors of the petitioners were among the small minority of stockholders who refused to participate.

By foreclosure decree dated April 27, 1896, and judicial sales and supplemental decrees in July, August and September of the same year, the Railway acquired, as contem-

plated by the Reorganization Plan, all the mortgaged properties of the Railroad, constituting the substantial bulk of its assets. By sequestration decree in 1899 the Railway similarly acquired the remaining unmortgaged properties. Since then the old Railroad has been an empty corporate shell, and all its former properties have been openly owned and operated by the Railway.

The Petitioners, their Predecessors and their Counsel.

From the first the proposed Reorganization Plan was opposed by a small but vocal minority of shareholders, located mainly in the Philadelphia area. Printed and apparently widely distributed correspondence between the Philadelphia law firm of Biddle & Ward (representing Railroad shareholders sent to them by the Philadelphia brokerage firm of Brice Monges & Co.) and Brayton Ives, president of the Rail*road*, heralded the formation of the petitioners' Committee of minority shares even prior to the foreclosure decree of April 27, 1896 (Def. Exs. 4-6, App. 295-7, 408-17). The final letter in this exchange of correspondence (April 15, 1896), after expressing dissatisfaction with Mr. Ives' position, states (App. 417):

> "We feel that under existing circumstances the stockholders of the Company will have to co-operate for the protection of their own rights without relying upon the Company."

In November 1898 a self-perpetuating stockholders' protective committee was created under an agreement which specifically contemplated litigation (Def. Ex. 1, App. 292, 403-4). Under this agreement some 30,000 shares, mainly common, were deposited. The present petitioner committee is acting under a redraft of the 1898 agreement

executed in 1906, which likewise specifically contemplated litigation (App. 288).

Mr. Charles Fearon of Philadelphia, by far the most active and influential member of the Committee, served from 1898 until his death in 1943. Two of the present members of the Committee, Messrs. Freeman and Welsh, are connected with the minority shares primarily by their friendship with Mr. Fearon (App. 380). The third, Robert W. Lishman, is the husband of Mr. Fearon's niece (App. 290), and is of counsel for petitioners as well as a party to this action in the dual capacity of a member of the Committee and trustee of his wife's holdings. The final petitioner George A. Landell, as executor for E. A. Landell, has been a "family friend for many years" (App. 291).

The Committee was represented during the years of its early activity by John G. Johnson, one of the outstanding members of the Philadelphia bar, who served until forced to withdraw because of a conflict of interests (App. 311, 340), and by Joseph C. McCullen, who represented the Committee as late as 1925, except for his period of service on the Bench in Philadelphia (App. 301, 498). Mr. McCullen, characterized on deposition by Mr. Lishman "as about as diligent a counsel as one could hope to have" (App. 304), was followed during the 1920s and 1930s by Thomas Boylan, formerly Mr. McCullen's law clerk (App. 345).

This Committee, its counsel and associated holders of minority shares have engaged in varying degrees of activity throughout the period following the 1896 reorganization. During the decade preceding this suit the Committee appeared to be more or less moribund; and for over 30 years it has sent no circulars of advice to the minority shareholders whom it claims to represent (App. 329).

Petitioners base their attempt to overturn the 1896 reorganization on two major points. They assert (a) that the 1896 transfer to the Railway was invalid because the mortgages foreclosed were illegal and "void" since Congress had not consented to them and (b) that the foreclosure proceedings themselves were void because procured by a "fraud upon the court" consisting of (i) misrepresentations as to the compliance of the Railway with the laws of the States through which the Federal right-of-way passed and (ii) misrepresentations as to the "independent" status of the Railway as a purchaser at the 1896 foreclosure sales.

Each of these points is presented now, as it was presented below, on the theory that it constitutes both a reason why petitioners should succeed on the merits and a reason why the action should not be dismissed for laches. We are concerned with them at this time only from the latter viewpoint, and shall consider them only to the extent necessary to show that they are identical with the claims which petitioners or their predecessors have been raising in various quarters, with uniform lack of success, for almost 60 years.

Activities in Behalf of the Dissenting Shares: 1896-1906.

During this decade petitioners or their counsel came into possession of every fact upon which they now rely and developed all of the claims and legal theories which they now advance.

Throughout this period they were active in many quarters, pressing their claims at meetings of the shareholders of the Northern Pacific Rail*road*, raising objections to officers of the Rail*way*, the executive departments and the Congress, examining the records of the reorganization and —in one instance—instituting legal proceedings which were

quickly allowed to lapse into inactivity. The antiquity of their present claims can thus be easily traced.

For example, pages 6-8 and 18-21 of the present petition assert that Congress in 1870 gave consent to only a single mortgage, that the mortgage powers of the Railroad were therefore exhausted by the original mortgage of 1870, and that all subsequent mortgages were void. This same contention appeared in the Biddle and Ward letters of April 6 and April 15, 1896 (Def. Exs. 4 and 6, App. 295, 297, 408, 415). It had in fact been rejected as early as 1883 by the United States Circuit Court for the Southern District of New York (*DuPont* v. *Northern Pac. R. Co.*, 18 Fed. 467).

Page 42 of the present petition asserts that the failure to obtain express Congressional approval of the 1896 Reorganization Plan supports petitioners' argument that the Railway is without capacity to take or hold the Railroad's property. The same argument appeared in a printed circular distributed in 1896, as part of the original attempt to organize a protective committee (Def. Ex. 2, App. 292, 405).

These initial protests were rejected and the Reorganization Plan was executed, the present respondent Northern Pacific Rail*way* coming into open and notorious possession of all properties of the old Rail*road* Company, including its rail system, franchises and land grant. A public statement to that effect was given to the New York Stock Exchange on December 1, 1896, and is quoted in the Complaint (App. 25).

Soon after the 1896 foreclosure there began a long series of complaints. The first of these were addressed to the Secretary of the Interior, who was in charge of issuing patents under the original land grant made by Congress in 1864. He referred the matter to the Attorney General, who on February 8, 1897, handed down a formal opinion in which, after reviewing the facts, he concluded:

> "You [Secretary of Interior] should act upon applications for patents by the new company upon exactly the same considerations which would govern you in case there had been no foreclosure and the applications were made by the old company" (21 O. A. G. at 491).

In reaching this conclusion, the Attorney General considered and rejected the argument that the unsuccessful attempt to obtain Congressional sanction of the foreclosure destroyed the validity of the reorganization. He ruled that Congress, by its Joint Resolutions of 1870, had given its consent to the transfer of the Railroad's properties and franchises upon any foreclosure of its mortgages. Whether President Cleveland's Attorney General was right or wrong, his opinion establishes at least the antiquity of the arguments advanced in the present petition.

The dissenting shareholders next turned their attention to the annual meetings of shareholders of the Railroad, appearing and objecting at each meeting from 1898 to 1905.* Their protests were in each instance defeated by the respondent Rail*way*, which held more than 95% of the Rail*road* stock pursuant to the 1896 reorganization.

Thus, at the 1899 shareholders' meeting, counsel for the Committee offered a resolution charging that the sales and proceedings by which the Railway had become possessed of the Railroad's property were "irregular, fraudulent and void" (App. 435). At the 1900 meeting a resolution was offered reciting that the property of the Railroad had been "irregularly and fraudulently" acquired by the Railway, and demanding the institution of legal proceedings against the Railway and all other persons responsible (App. 440).

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* *1898*—Def. Ex. 8, App. 298, 417-23; *1899*—Def. Ex. 10, App. 304, 435-6; *1900*—Def. Ex. 24, App. 306, 440-1; *1901*—Def. Ex. 25, App. 308, 441; *1902*—Def. Ex. 26, App. 308, 441; *1903*—Def. Ex. 66, App. 347, 513; *1904*—Def. Ex. 67, App. 348, 517; *1905*—Def. Ex. 35, App. 326, 474.

Whether the defeat of these and other similar resolutions was right or wrong, the fact of that defeat establishes the antiquity of the present claims, and should have served at the time as a warning to petitioners that if they desired redress they should proceed promptly in the courts.

In fact, a representative suit in equity, based on the same claims as the present complaint, was begun in the Southern District of New York in November 1900. The plaintiff was Joseph Hoover, who had been a member of the opposition slate of directors nominated on behalf of the Committee in 1898 (App. 420). His complaint stated that he was suing "on behalf of himself and such other stockholders of the Northern Pacific Railroad Company as may intervene" (App. 423). The defendants were the Railroad, the Railway, the directors of both, members of J. P. Morgan & Company and others. Plaintiff Hoover was represented by Mr. Johnson and Mr. McCullen (App. 434), who were also counsel for the Committee. While the Committee was not formally a party to the suit, it was looked to for guidance (App. 170-1; Def. Ex. 37, App. 327, 476) and was generally "familiar with the progress of the Hoover suit" and "knew of [its] pendency" (App. 144, 300).

Hoover's lengthy bill of complaint (App. 423-34) recited generally the circumstances of the 1896 reorganization. It alleged that the reorganization managers and the Railway, by acquiring control of the majority of the Rail*road's* stock, had entered "into the domination" of all its affairs (App. 429). The relief asked was a full and complete discovery, a declaration of trust and an accounting (App. 433).

The answer of the *Hoover* defendants was filed on February 1, 1901. Depositions of some of the individual defendants were taken during 1903. As the docket entries in the *Hoover* case show (Def. Ex. 70, App. 359, 520), nothing else happened between July 24, 1903, when the last

deposition was filed, and November 1, 1937, when a motion was made to substitute Hoover's executor as party plaintiff.

Even while the *Hoover* case remained active, McCullen found time to pursue other "remedies". At the 1902 annual meeting he requested the management to "assist fully in every way" in a forthcoming Congressional investigation (Def. Ex. 26, App. 308, 446). His proposed resolution asserted as grounds for the investigation several points now asserted half a century later in this litigation, including the claim that the Rail*way* Company "had been consolidated with and merged in the Rail*road* Company" and that the issue of mortgage validity "was left undetermined and in dispute, such purchase being had and made by agreement". We thus find as early as 1902 the same alleged "lack of independence" of the Railway which serves as a basis for the "fraud upon the court" argument advanced at page 22 of the present petition. Petitioners indeed admit that the facts upon which they base that claim of "fraud upon the court" have been "open and known or discoverable" throughout the period under discussion (Petition p. 22, n. 1).

Acting under the prayer for discovery in the *Hoover* complaint, McCullen and his co-counsel Mr. Davenport turned in 1903 to an investigation of the books and records of the Railroad and Railway Companies, and secured a substantial amount of additional material (Def. Exs. 68, 108, 109, App. 158-163, 389, 554-5).

They then apparently abandoned the *Hoover* case, and turned instead to appeals to the Executive Departments and to Congress. In 1904 McCullen began a correspondence with the Interior Department (Def. Ex. 28, App. 321, 448 *et seq.*) in which he sought to overturn the Attorney General's opinion of 1897 which had recognized the Railway as successor to the Railroad.

His efforts led to a hearing at which McCullen submitted briefs to the Department and a memorandum to the Attorney General. Excerpts from these papers appear in Def. Exs. 30-33 (App. 321-25, 458-72). The now familiar points relating to the invalidity of the mortgages (App. 461, 463-4, 471) and the nullity of the decrees (App. 464, 469) were again advanced. These hearings resulted in the Attorney General's formal advice to the Secretary of the Interior that "the decision of my predecessor was correct, and accordingly I have to advise you that, in my opinion, you should continue to be governed" by the earlier opinion (25 O. A. G. 401, April 12, 1905).

The District Court thus comments on the 1897 and 1905 opinions of the Attorneys General (Appendix A to Petition, p. 14a):

> "It would seem that long ago plaintiffs should have been cautioned by the unproductive results of their protests to the non-judicial branches of the government * * *. [citing 21 O. A. G. 486 and 25 O. A. G. 401.] Thus, twice executive officers with responsibility of guarding the public interest put plaintiffs on notice that no support would be forthcoming from that branch of the government."

Activities in Behalf of the Dissenting Shares: 1906-1950.

With a few significant exceptions, the events of the 45-year period which began in about 1906 and ended with the filing of the present complaint, parallel closely the activities in behalf of the dissenting shares before 1906, and need not be set forth at length.*

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* See Def. Ex. 34, App. 325-6, 473; Def. Exs. 39-41, App. 330, 477-87; Def. Exs. 44-51, App. 336-7, 488-96; Def. Exs. 55-62, App. 341-3, 497-509; Def. Exs. 71-85, App. 364-73, 522-44; Def. Ex. 89A, App. 374, 544-5; Def. Exs. 91 and 93, App. 375, 546-8.

These activities included:

Repeated protests and demands for legislative and other action at meetings of the stockholders of the Railroad.

Unsuccessful sponsoring of Congressional resolutions, with attendant publicity.

Correspondence with the Interior Department, the Interstate Commerce Commission, the Director General of Railroads during World War I, members and prospective members of Congress, and officials of respondent Railway.

Especially significant was the activity—or lack of activity—on behalf of the minority shares with respect to two matters of litigation, the *Hoover* and *Land Grant* cases.

(a) *Correspondence in the Hoover Case.* Beginning with a letter of April 1, 1904 in which McCullen advanced the excuse that certain printing has been delayed "*because we have not yet conferred with the Committee we represent*" (quoted in Def. Ex. 123, App. 170-1, 402)—counsel for Hoover displayed an entire disregard for the diligent prosecution of the action, which led Mr. Stetson (counsel for the *Hoover* defendants) to warn them and the Committee in ever stronger terms that their continued delay would lead to their claim becoming barred by laches.

Specific warnings to this effect were given to members of the Committee at the 1906 and 1909 stockholders' meetings (Def. Exs. 37 and 106, App. 327, 388-9, 476). They were repeated in 1909 to Mr. Davenport, Hoover's co-counsel (App. 172).

On November 24, 1914 Mr. Stetson wrote Mr. McCullen as follows (Def. Ex. 43, App. 251, 332-3):

> "I understand that you have never had printed the minutes of the Hoover suit as undertaken by you many years ago, *despite my repeated notices to you*

> *and your clients that I should insist that your delay constituted such laches as would bar the further prosecution of that suit.** I have advised you also that I have found that Mr. Hoover, who is now dead, had consented to and participated in the reorganization of 1896."

On March 28, 1916, he wrote McCullen once more along the same lines (Def. Ex. 98, App. 381, 552). McCullen replied a few days later (Def. Ex. 100, App. 381, 553):

> "That a great wrong has been done them has always been believed in but *discovery of the breach of trust and of the perfidy of the fraud perpetrated against them was not had until now,* the facts having been most skillfully concealed from government officials, from the Court and from the public."

A further delay of thirty-four and one half years followed this *"discovery of the breach of trust"* before the Complaint in this action was filed.

(b) *The Land Grant Case.*** For many years controversies had arisen between the United States and the Railway regarding the nature and scope of the latter's land grant rights as successor to the old Rail*road.* On June 5, 1924 Congress established a joint committee to investigate the whole problem (43 Stat. 461). Five years of study and hearings resulted in a bill, enacted June 25, 1929, by which the Attorney General was authorized to institute an action to obtain "a final and complete determination of the respective rights * * * to the end that the grants shall be finally adjusted and the interests of the United States and the grantee shall be fully protected * * *"

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* Italics ours throughout this brief.

** *United States* v. *Northern Pacific Railway Company, et al.,* 311 U. S. 317 (1940).

(46 Stat. 41, 43 U. S. C. Sections 921-929). The hearings preceding this enactment were followed continuously by an attorney for the Stockholders' Committee (Mr. Boylan); and the attention of Congress was "directed to the existence of these non-assenting shares" (App. 360).

The Attorney General in 1930 brought an action in the District Court for the Eastern District of Washington, challenging in certain particulars the foreclosures of 1875 and 1896 but nevertheless alleging that the Railway Company had succeeded to the rights granted under the original 1864 charter.* Mr. Lishman testified that Mr. Boylan, counsel for the Committee, "cooperated with the Government in the preparation of its case" (App. 346).

The case was referred to a Special Master, who made reports on May 31, 1933 and July 26, 1937. It was not until August 25, 1937 that the minority shareholders "filed without leave of court to intervene, a motion for an extension of time to file exceptions to the Special Master's report". After other procedural moves, they filed on January 20, 1938 a petition to intervene and took other steps designed to inject themselves into the Land Grant proceedings (102 F. 2d at 589, 591).

One of the stockholders joined in these efforts was George A. Landell, as executor of E. A. Landell, who in the same capacity now lends his name to the present action (App. 271). The Committee of minority stockholders, although—as in the *Hoover* case—not formally joined as a party, were fully aware of the attempted intervention (App. 357-8). Counsel for the intervenors included Mr. Boylan, the counsel for the Committee who had attended the Congressional hearings. The expenses and fees involved were

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* The course of the litigation is summarized by Judge Wilbur in *Schmidt* v. *United States*, 102 F. 2d 589, 591, 592 (9th Cir. 1939), and by Judge Schwellenbach in *United States* v. *Northern Pacific Railway*, 41 F. Supp. 273, 280-282 (E. D. Wash. 1941).

paid by Mr. Fearon, who had been the most active member of the Committee since 1898 (App. 345, 357).

The contentions advanced in the petition to intervene were only a rehash of the claims the minority stockholders had by that time been making for 40 years. Among other things, the foreclosure of 1875, the mortgages placed on the property after 1875, the reorganization and foreclosure of 1896, and the title of the Rail*way* to the Rail*road's* properties thereunder were all alleged to be invalid. (See 102 F. 2d 589 at 593). On March 9, 1938 the District Court denied the motion to intervene.

An appeal was taken to the Ninth Circuit Court of Appeals which, on March 17, 1939, affirmed the order denying intervention on alternative grounds, one of which was the seven years' delay by the stockholders before seeking intervention (102 F. 2d 589 at 595-6).

This Court's denial in October 1939 of certiorari to review this decision (308 U. S. 509) did not end the efforts of the minority shareholders to inject themselves into the *Land Grant* case. Before the argument and again before the reargument in 1940 of that case in this Court, the minority stockholders moved for leave to appear, which was denied on each occasion (309 U. S. 626; 311 U. S. 613).

Following the 1940 decision of this Court (311 U. S. 317), upon remand to the District Court the *Land Grant* case was settled, and all disputes between the Government and the Railway were terminated, with the approval of the Attorney General and the Court, after notice had been given to other interested executive departments and to both houses of Congress and no objections had been received. The terms of the settlement are set forth in the District Court's opinion, which also denies a final attempt by the minority shareholders to intervene (41 F. Supp. 273 at 280).

3. *Final dismissal of the Hoover case for laches.* Contemporaneously with the fruitless maneuvers described above, Mr. Boylan took steps to revive the *Hoover* case, which, by that time, had been inactive for almost 35 years. Plaintiff Hoover and all of the original counsel were dead, as well as all but six of the 39 individual defendants. Mr. Boylan, whose fees were again paid by Mr. Fearon (App. 302, 345), first obtained an *ex parte* order substituting Hoover's executor as plaintiff in 1937. Then, following dismissal of the case in 1938 for failure to answer a calendar call, he moved to restore it to the trial calendar. Judge Hulbert denied this motion, in an unreported opinion dated March 15, 1939 (Def. Ex. 123, App. 165-73, 402). He quoted at length from the letters discussed above (pp. 14-15) in which Mr. Stetson had repeatedly warned that continued delay would result in the action becoming barred by laches. Judge Hulbert noted that no sufficient excuse had been presented to explain the thirty-five year delay, and referred to the obvious physical changes that had occurred in the operation of the Railway since 1896. He denied the motion on the ground that (App. 173):

> " 'The mere institution of a suit does not of itself relieve a person from the charge of laches; and if he fail in its diligent prosecution, the consequences are the same as though no action had been begun.' (*Johnson* v. *Standard Milling Company*, 148 U. S. 360.)
>
> The Court does not feel there is any justification for the restoration of this cause to the calendar because of inexcusable laches in its prosecution, and the motion is accordingly denied. * * *"

No appeal was taken from Judge Hulbert's order.

Following the failure of his efforts in the *Land Grant* and *Hoover* cases, Boylan turned to attempts to obtain a

settlement (App. 369-372). When these failed he wrote the Railway on June 26, 1941 (Def. Ex. 77, App. 370, 534):

> "• • • we are now preparing the pleadings in a proper proceeding to be *promptly* instituted for the enforcement and protection of all the rights of our clients."

Nine and one-half more years—marked only by desultory correspondence (Def. Exs. 89-A, 93, App. 374-5, 544, 547) by Mr. Lishman, who replaced Boylan as counsel for the Committee in 1942—were to elapse after this threat of "prompt" action, before the present complaint was filed in December 1950.

All of the foregoing facts are undisputed. Nearly all of them are established either by documents from petitioners' own files or by the deposition of Mr. Lishman, one of the petitioners and also their counsel. We have set them forth at such length because they furnish the basis upon which both courts below acted in dismissing the complaint, and because they have been largely disregarded or passed over in the petition.

Argument.

What the facts set out above demonstrate—and what petitioners indeed now admit—is simply this: they or their predecessors have known all about their present claims for at least half a century but have deliberately refused to bring suit until every participant and witness had died and the position of the respondent had changed beyond recognition. This situation, entirely of petitioners' own making

and scarcely a reason why the docket of this or any other court should now be burdened with their claims, is entirely unique. To our knowledge there is no other reported case involving laches in which the facts were so extreme or in which the decision seems less likely to serve as a precedent. The closest case on facts that we have found is *Young* v. *Southern Pacific Co.*, 34 F. 2d. 135 (2d Cir.), *cert. denied*, 280 U. S. 597 (1929) which involved an attempt by shareholders in the old Houston & Texas Central Railway Company, at the time of the suit an empty corporate "shell" much like the Northern Pacific Railroad, to litigate a reorganization which had taken place under court decree in 1888. Their suit, instituted in 1926, was dismissed on demurrer for laches.* But even the nearly 40-year delay by the plaintiffs in the *Young* case falls short by more than a decade of approaching the half century during which present petitioners have procrastinated in asserting their claims.

We submit that the dismissal of the complaint for laches by both courts below was clearly correct. No extensive analysis of cases is necessary to establish that an unreasonable and unexplained delay in bringing action, accompanied by death of witnesses and change in position of defendant, bars absolutely the assertion of a claim by those with full knowledge of the facts, *e. g.*, *Johnson* v. *West India Transit*

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* The theory of the complaint in the *Young* case is identical with that litigated in *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483 (1919) in which other and more diligent stockholders of the old Houston & Texas Central Railway Company were successful, after protracted litigation in several different courts, in gaining a favorable decision in this Court. Petitioners' reliance on the *Bogert* case (Petition 11, 12, 27, 28) is misplaced. In that case, unlike the present one, the plaintiffs had been given no opportunity to participate on equal terms and had been actively and continuously engaged in litigation from the outset to vindicate their rights. The total period elapsing between the accrual of their cause of action and the entry of final judgment in their favor was less than half the time that has elapsed here. Even so, the lower court alluded to the "long and unusual delay" (244 Fed. 64) and indicated that the statute of limitations would have been a bar if defendant had not waived it (244 Fed. 65-6).

Co., 156 U. S. 618, 647-649 (1895). Laches is a perfectly effective defense whether it is alleged that transactions are "void", *e. g.*, *Abraham* v. *Ordway*, 158 U. S. 416, 418-421 (1895), or judgments and deeds are attacked on the grounds of fraud, *e. g.*, *Boone County* v. *Burlington & Missouri River Railroad*, 139 U. S. 684, 692-694 (1891). Mere repeated objections unaccompanied by positive action to assert a claim will not excuse delay. *E. g.*, *Penn Mutual Life Insurance Co.* v. *Austin*, 168 U. S. 685, 697, 700 (1898). It was well settled under the old Equity Rules that laches could properly be raised by motion in advance of trial, *e. g.*, *Hays* v. *Port of Seattle*, 251 U. S. 233, 239 (1920). This is also true under the Federal Rules of Civil Procedure. *Dixon* v. *American Telephone & Telegraph Co.*, 159 F. 2d 863 (2d Cir.), *cert. denied*, 233 U. S. 764 (1947) (laches properly raised on motion for summary judgment).

None of the above-cited cases is discussed in the petition, which advances, as the major ground for granting certiorari, alleged conflicts between the decisions below and a number of decisions in this Court and other courts in which laches was held not to be a bar. No such conflict exists; and none of the cases cited deals with a fact situation even remotely analogous to that presented here.

Petitioners argue initially that laches cannot bar an action on their so-called "statutory contract", citing *Oregon & California Railroad* v. *United States*, 238 U. S. 393 (1915); 243 U. S. 549 (1917), (Petition 11, 14-19). The short and complete answer is that in that case the United States was plaintiff and, of course, laches is not imputable to the sovereign.*

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* In *Southern Oregon Co.* v. *United States*, 241 Fed. 16 (9th Cir. 1917), *app. dismissed*, 249 U. S. 589 (1919), cited in support of the same proposition (Petition 11, 15), the United States was also plaintiff. *Ewert* v. *Bluejacket*, 259 U. S. 129 (1922), cited in the same connection on pages 11, 16 and 19 of the petition, holds merely that a delay of 7 years by Indian "wards of the nation" would not bar an action to enforce rights arising from a statute passed for their specific benefit.

Petitioners' second argument is that they are entitled to litigate their claims after a 50-year delay because of alleged "fraud on the court" which entered the decrees of foreclosure in 1896—a "fraud" which by petitioners' own admission has been "open and known or discoverable" ever since. *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514 (3rd Cir.), *cert. denied*, 296 U. S. 626 (1948), mainly relied on in support of this theory, decided only that in a case involving the integrity of the courts a delay possibly fatal to a private litigant in ordinary circumstances would not bar the correction of a judgment tinged with serious fraud. A consideration of the nature of the fraud there involved—the bribery of a judge of a Court of Appeals—and of the relatively short delay involved makes it clear that there is no inconsistency with the decisions below.*

Assuming *arguendo* that recovery for past wrongs is barred by laches, petitioners next turn their attention at pp. 36-41 to their "alternative theory" of relief, which is said to be for "violation of their existing and continuing present and future rights." They assert under this theory that the decisions below are in conflict with several decisions cited erroneously as holding that delay can never bar injunctive relief for continuing violation of trade-mark and patent rights, although an action to recover damages for past violations may be foreclosed. The District Court is criticized for failing "to meet these separate issues squarely" (Petition 36, 53). This seems an unfair criticism

* In this connection petitioners also cite *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238 (1944). This case, dealing with active fraud before the Patent Office and the courts established by undisputed affidavits and uncovered at most nine years before action was brought, is also based on such different facts as to raise no possible question of conflict. In *Stoddard* v. *Chambers*, 2 Howard 284, 318 (1844) and *Johnson* v. *Waters*, 118 U. S. 640, 667 (1884), (Petition 11, 22), the question of laches does not appear to have been raised or discussed at all.

of the thorough opinion of the District Court since petitioners did not press this point to any appreciable extent below. Moreover, the cases cited by petitioners do not support their contentions. While *Menendez* v. *Holt*, 128 U. S. 514 (1888) (Petition 47-48) does hold that the right to an injunction against future infringement of a trademark was not lost *on the facts presented in that case* though an action for damages based on past infringement had become barred, the opinion points out that an injunction may be barred by delay if it has been "continued so long and under such circumstances as to defeat the right itself" 128 U. S. at 523. Even less persuasive is *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 419 (1916) which holds, directly contrary to the incorrect statement on page 48 of the petition, that 40 years of non-use of a trademark will bar an injunction for infringement as effectively as an action for past damages. The other cases cited in pages 44-50 of the petition add nothing of substance to these arguments of "continuing wrong".*

Finally, petitioners contend that they should have been afforded a full trial and that summary judgment was improperly granted by the District Court, because of the "important public issues involved" (Petition 50-54). Signi-

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* On pages 44 to 47 petitioners cite these three railroad cases: *Pennsylvania Railroad* v. *St. Louis, etc. Railroad*, 118 U. S. 290 (1886); *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24 (1891); *United States* v. *Southern Pacific Co.*, 259 U. S. 214, 234 (1922). In each of these an allegedly "void" lease was considered, rather than a completed conveyance, and in none of them is laches raised or discussed. *Schaffer* v. *Rector Well Equipment Co.*, 155 F. 2d 344 (5th Cir. 1946) (Petition 48) is not in conflict with the decisions below since there plaintiff had delayed for only 9 years and there was no showing of the death of witnesses, loss of evidence or a significant change in position of defendant. It is clear that in patent cases an injunction against future infringement as well as an action for past damages will be barred by unreasonable delay comparable to the conduct of petitioners during the past five decades. *E.g.*, *Brennan* v. *Hawley Products Co.*, 182 F. 2d 945 (7th Cir.), *cert. denied*, 340 U. S. 865 (1950).

ficantly, they do not contend that there is any dispute as to the material facts upon which their complaint was dismissed for laches. There are two answers to this final point. First, the propriety of the summary judgment procedure was not questioned in either court below. On the contrary, each main brief of petitioners heretofore submitted has closed with a prayer that summary judgment be entered in *their* favor on the merits. Second, and despite the desultory arguments which plaintiffs and their predecessors have been advancing since 1896, no public interests are involved. The same "public interest" claims which they advance in their present petition were rejected by President Cleveland's Attorney General in 1897, by President Theodore Roosevelt's Attorney General in 1905, by Congress in 1908 (App. 477-87) and by the Courts which denied the attempted interventions in the *Land Grant* case in the period 1938-40.* The interest, if any, of the public in the 1896 reorganization was raised and litigated by the Government in the *Land Grant* case, and any such questions were finally settled upon the remand of that case to the District Court (*supra*, p. 17).

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* *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 256-257 (1948), cited by petitioners on the summary judgment point, involved not only issues of national importance—an interpretation of the Fair Labor Standards Act involving the claims of many thousands of defense plant employees—but also disputed issues of fact going to the merits of the case. Other cases cited on this point are equally inapplicable. *Eccles* v. *Peoples Bank of Lakewood Village*, 333 U. S. 426, 434 (1947) was concerned solely with whether the controversy in issue was "justiciable". *Arenas* v. *United States*, 322 U. S. 419, 434 (1944) was remanded to the District Court for necessary findings of fact. *Palmer* v. *Chamberlin*, 191 F. 2d 532 (5th Cir. 1951) holds merely that on its particular facts summary judgment was properly granted. All of these cases are consistent with the use of summary judgment on the motion to dismiss for laches in this case.

Conclusion.

The decisions of both courts below were obviously correct and in accordance with long-settled principles. The petition should be denied.

Dated: September 1, 1955.

Respectfully submitted,

PORTER R. CHANDLER,
15 Broad Street,
New York 5, N. Y.,
Counsel for Respondent.

M. L. COUNTRYMAN, JR.,
176 E. Fifth Street,
St. Paul 1, Minnesota,

BERNARD G. OSTMANN,
Transportation Building,
Washington 6, D. C.,

WILLIAM A. KAYNOR,
15 Broad Street,
New York 5, N. Y.,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 299

GEORGE A. LANDELL, EXECUTOR, ET AL., *Petitioners,*

v.

NORTHERN PACIFIC RAILWAY COMPANY, *Respondent.*

PETITION FOR REHEARING

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

On October 10, 1955, petition for writ of certiorari was denied in the above-entitled case, decided by the Court of Appeals for the District of Columbia Circuit, Judges Prettyman, Bazelon and Bastian sitting. The Court of Appeals by per curiam opinion affirmed the summary judgment of District Court Judge Tamm dismissing the complaint for laches. This suit involves a railroad main line franchise and right of way through the federal public domain with privilege of tax exemption thereon, all vested by Con-

gress in the existing federal corporation, Northern Pacific Railroad Company, in which petitioners hold about 3% of the stock and respondent 97%. Respondent claims full ownership of the franchise and tax exemption privilege by virtue of consent decree of a Wisconsin federal court made in proceedings wherein petitioners were not parties and no provision was made for them.

The fundamental constitutional question in this case (See "Franchises", Charles W. Needham, 15 Col. L. R. 97), ignored by the courts below, is that respondent is taking and using the Railroad's federal operating franchise, a property of great value, without compensation to petitioners who have ownership rights in this franchise. The District Court's opinion erroneously treats the complaint as an attempt to upset ancient, free grants of land. Its failure to recognize and decide the franchise question constitutes abdication of the judicial function which should not be condoned by this Court.

Congress has not authorized transfer of the franchise to respondent. The existing federal corporation has no power to make a voluntary assignment of the franchise to respondent. The consent foreclosure decree purporting to make this assignment has been held by this Court as having no higher status than a private agreement. *Northern Pacific Railway Co.* v. *Boyd*, 228 U. S. 482 (1913).

Inherent in this case but not decided are four questions:

1. In the absence of federal legislation can the State of Wisconsin or a court authorize respondent, as alleged successor to the federal corporation, to operate

the main line of railroad through the federal public domain in seven States?

2. In the absence of federal legislation can the State of Wisconsin or a court authorize respondent's taking and using of the privilege of right of way tax exemption granted by statute to Northern Pacific Railroad Company, the federal corporation?

3. Can respondent take, and keep to itself the current and future benefits of the franchise and tax exemption privilege in the absence of a repeal of the statute which vests same perpetually in the original federal corporation stockholders and their successors as members of a continuing body politic and corporate?

4. Should this Court permit respondent to continue unchecked its systematic misrepresentation that notwithstanding the absence of enabling federal legislation, it is entitled by virtue of consent decree and its 97% stock ownership to the full legal ownership of the aforesaid federal railroad franchise and tax exemption privilege, when the consent decree itself expressly refused to adjudicate this question?

Another question inherent in this case and decided upon the basis of a most treacherous record is: In view of the above-stated undecided matters, should the courts permit respondent to use petitioners' alleged laches to prevent judicial inquiry and determination concerning (a) respondent's present and continuing operation of the federal corporation's main line railroad and continuing use of its franchise and tax exemption privilege, and (b) respondent's continuing, systematic misuse of the judicial process to hold and use the assets vested in the federal corporation by Congress?

We therefore respectfully request that the Court's action in declining to grant a writ of certiorari be

reconsidered. We direct the Court's attention to the following:

I.

The circumstances herein are unusual. The District Court and Court of Appeals have refused to adjudicate any of the first four basic questions, all of which could have been determined as a matter of law from the bench. The courts below have arbitrarily and unjustly eliminated them from consideration or judgment. The lower court's opinion makes no mention of them. It discusses a cause of action not contained in the complaint. A rudimentary sense of fair play and good judicial administration require that this Court should not countenance the lower court's refusal to decide the basic questions in this case and its repudiation of the federal statute.* We have shown in our briefs below and in our petition for certiorari that the doctrine of laches cannot justify failure to dispose of these questions.

Government under law means at the minimum that judges must not abdicate the judicial function and balk at adjudging the rights of citizens under the plain terms of a statute. Repeal of statutes is a legislative function and the doctrine of laches affords no justification for the courts to infringe upon this legislative prerogative. Congress has refused to dissolve the federal corporation when requested to do so by petitioners. We respectfully urge that the summary judgment herein is inconsistent with the doctrine of separation of powers.

II.

The per curiam affirmance by the Court of Appeals of Judge Tamm's decision sanctions such a departure

* The word "statute" herein means the Act of July 2, 1864 (13 Stat. 365).

from the usual and accepted course of judicial proceedings as to call for the exercise of this Court's power of supervision. The proceedings were for summary judgment. The courts below have ignored and refused to accept well pleaded allegations in the complaint which were not controverted in the answer or in the record. The District Court's opinion contains a series of erroneous statements of material facts.

An appellate court, from a reading of the District Court's opinion, would fail to comprehend that it omits reference to fundamental elements of the cause of action pleaded in the complaint and that it contains incorrect statements of fact which were materially detrimental to the case of petitioners. See *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 489 (1951).

A columnar analysis makes clear the force of the foregoing statement:

Erroneous Statements in Judge Tamm's Opinion, 122 F. Supp. 253	**Corrections, Plus Comment**
(1) "Plaintiffs' allegations are substantially that the defendant became the legal successor to the Railroad by a fraud upon the Wisconsin court, that defendant has maintained this position by the misuse of judicial process, that the Wisconsin court exceeded its authority in approving conditions in the consent decrees which were in violation of the statute creating the Federal corporation, and that the proceedings were also void in that the United States was not made a party thereto." (122 F. Supp. at 254)	(1) This statement omits mention of the franchise and tax exemption issues and the fact that Congress has refused to authorize respondent as successor to the federal corporation. An appellate court relying upon this statement would be misled from and would not appreciate the significance of the factual allegations in the complaint and the legal consequences flowing therefrom. This statement demonstrates the failure of the court to accept the well pleaded allegations in the complaint. Following are complaint allega-

Erroneous Statements in Judge Tamm's Opinion. 122 F. Supp. 253	Corrections. Plus Comment
	tions which Judge Tamm's opinion eliminated from the case:
	(a) "LIV. That the Congress of the United States has refused to authorize or accept the defendant, Northern Pacific Railway Company, as the legal successor to the Northern Pacific Railroad Company and has refused to sanction the transfer of such Railroad Company's franchise and property to the defendant and no such authorization, acceptance or sanction has ever been made. In 1896, prior to said judicial sales, defendant applied to Congress for legislation enabling it to purchase all the estate, rights, franchise and powers of the Northern Pacific Railroad Company and the right to be deemed the instrumentality for accomplishing the national public purposes provided in said Act of July 2, 1864, and said Joint Resolution of 1870, and the right to create additional mortgages. (House Resolution 190, 54th Congress, 1st Session, 1895; 1896. House Reports, Vol. 9, Report No. 2181. Senate Joint Resolution 124, 54th Cong., 1st Session, 1895; 1896. Senate Reports, Vol. 4, Report No. 776.) These Resolutions were not adopted." (R. 35)

Erroneous Statements in Judge Tamm's Opinion, 122 F. Supp. 253	Corrections, Plus Comment
	(b) "LII. That the franchises and right-of-way granted to the Northern Pacific Railroad Company under the Act of July 2, 1864, are inalienable without legislative authorization by the Congress of the United States and the purported sales of same to defendant without such legislative authorization and under the guise of said consent decrees and order of 1896 are void and of no effect in divesting said franchises and right-of-way and transferring same to defendant. Congress refused, as shown hereinafter, to grant such authorization. Defendant's illegal possession and control of said franchises and right-of-way under said void decrees and orders have wrongfully deprived and are so depriving the plaintiffs and others similarly situated of property to which they are entitled under the Constitution of the United States and under the said Act of July 2, 1864. Defendant, since July 13, 1896, to date, has continuously used its power as holder of more than 90% of the stock of the Northern Pacific Railroad Company to dominate and control said Company and to utilize its

Erroneous Statements in Judge Tamm's Opinion, 122 F. Supp. 253	Corrections, Plus Comment
	existence only to bolster defendant's illegal possession and enjoyment of the franchises and right-of-way rightfully belonging to said Northern Pacific Railroad Company." (R. 33)
	(c) "The Northern Pacific Railroad Company by consent decree or otherwise was incompetent to transfer its railroad, franchises, right-of-way and other property and rights to property to defendant, and defendant was and is incompetent to take and hold same." (R. 44)
	(d) Prayer 2, nowhere mentioned by Judge Tamm, reads as follows: "That it be adjudged and decreed that the defendant, Northern Pacific Railway Company, has no right, title or interest in or to the franchises, railroad and right-of-way granted to the Northern Pacific Railroad Company under the Act of July 2, 1864 (13 Stat. 365) and the Joint Resolution of May 31, 1870 (16 Stat. 378) except as holder of the majority of the capital stock and the bonds of said federal corporation, and that title to same is in the Northern Pacific Railroad Company." (R. 75)

Erroneous Statements in Judge Tamm's Opinion, 122 F. Supp. 253	Corrections, Plus Comment
	The franchise question was shown at the argument in the District Court to be the most basic issue in the case. The Transcript of the Hearing reads, at pp. 209-210:
	"The well pleaded allegations and affidavits herein establish that the defendant, for more than fifty years, has utilized the special railroad franchise granted exclusively to the federal corporation, has used that power to cross navigable streams, which it could not have done without federal authorization and has used that power to operate a railroad system through the public domain, through Indian reservations, which it could not do lawfully without direct power from Congress, and that in order to show its chain of title, back to Congress on its right to these things, it has procured consent decrees, managed to have Attorneys General accept such decrees as final and conclusive, and having the same validity as though entered in a contested proceeding and on that basis, has managed until now to weather every challenge that has been made as to the legality of successorship and ownership.

Erroneous Statements in Judge Tamm's Opinion, 122 F. Supp. 253	Corrections, Plus Comment
	"In this case, for the first time, and I challenge my learned brother to cite authority to the contrary, in this case, for the first time the full merits of the matter have been brought into question, and in this case we have an opportunity of going ahead and settling the questions that were reserved by the Supreme Court in 1940."
(2) "*Subsequent to dismissal of the suit*, it was learned that Hoover instead of being a bona fide non-assenting shareholder, had actually participated in the reorganization, voting some of his stock in favor of the reorganization." (Emphasis supplied. 122 F. Supp. at 255).	(2) This statement is incorrect. It ignores the facts before the court. *Long before* the 1939 dismissal of the Hoover suit it had been learned that Hoover had no status to sue. Prior to the 1939 dismissal counsel for both parties had in their possession or control documents which conclusively established that Hoover had no standing to sue. These documents show that the Hoover case originally abated in 1904 (when John G. Johnson, Esq. withdrew as Hoover's counsel)* because Hoover

* Judge Tamm at several places describes John G. Johnson, Esq., as counsel for plaintiff committee. Mr. Johnson withdrew as counsel for Hoover and for any dissenting shareholder in 1904 because in that year he became counsel for defendants named in the Hoover suit. This fact appears in *Harriman* v. *Northern Securities Co.*, 196 U.S. 641 (1904). The plaintiff committee was not established until October 1, 1906 (R. 5).

Erroneous Statements in Judge Tamm's Opinion, 122 F. Supp. 253	Corrections, Plus Comment
	had agreed to the reorganization by depositing 500 shares of stock thereunder.
	Judge Tamm's attention was called to these facts both in written briefs and oral argument. The statement in his opinion that not until "*subsequent to dismissal of the suit*" in 1939 was it learned that Hoover had no right to sue as a dissenter is erroneous.
	Before the motion for summary judgment herein, respondent's counsel was permitted to inspect and copy documents in petitioner's files, including papers from the files of Boylan, counsel for Hoover in the 1939 motion before Judge Hulbert.
	One of these documents was a letter dated November 24, 1914, from Francis Lynde Stetson, Esq., one of the defendants in the Hoover suit and also respondent's counsel therein, to McCullen, who had been counsel for Hoover. This letter stated that Hoover "had consented to and participated in the reorganization of 1896." (R. 251).
	With such letter in his files Boylan nevertheless in 1939 moved to restore the Hoover

Erroneous Statements in Judge Tamm's Opinion, 122 F. Supp. 253	Corrections, Plus Comment
	case and filed his affidavit excusing 35 years' failure to prosecute on the ground of missing papers. He did not allege they had been found in 1939. Nor did he disclose to the court that it was then known to the parties or that the knowledge was readily available to them that Hoover never had status to sue as a dissenter. Another document in Boylan's and respondent's files in 1939 showing that the motion to restore the Hoover case to the calendar was spurious, was Exhibit E to Item No. 46 submitted by respondent's counsel and vice president at the Hearings in 1926 before the Joint Congressional Committee for the Investigation of the Northern Pacific Railroad Land Grants, pursuant to Public Resolution No. 24, 68th Cong., approved June 5, 1924 —the JCC Hearings, p. 3393. (R. 256). Exhibit E lists Hoover as a party to the 1896 reorganization agreement. This Exhibit and the 1914 letter, if made known to Judge Hulbert in 1939, would have made it impossible for him to render his inexcusable laches decision now used

Erroneous Statements in Judge Tamm's Opinion, 122 F. Supp. 253	Corrections, Plus Comment
	against the petitioners. It was utterly improper for respondent to allege that Hoover was a "dissenting stockholder" (R. 115) and to plead the 1939 Hoover decision as *res judicata* (R. 119). The District Court's factual error and reliance upon such allegation and pleading calls for intervention by this Court.
(3) "In 1897, during the term of President Cleveland, counsel for the committee appealed to the Secretary of the Interior, and the matter was referred to the Attorney General who held the claims were unfounded. 21 Opinions of the Attorney General 486. In 1904, during the administration of President Theodore Roosevelt, another appeal was made to the Secretary of the Interior. It was again referred to the Attorney General and again was rejected by him. 25 Opinions of the Attorney General 401. Thus, twice, executive officers with the responsibility of guarding the public interest put plaintiffs on notice that no support would be forthcoming from that branch of the government." (122 F. Supp. at 257).	(3) Counsel for the committee did *not* during the term of President Cleveland appeal to the Secretary of the Interior. Their claims were *never referred* to the then Attorney General. He *never held*, directly or indirectly, that their claims were unfounded. The incorrectness of this statement casts a cloud over the entire opinion herein. The fact is that the 1897 opinion of the Attorney General, 21 Op. A.G. 486, was *not* generated by the petitioners or anyone connected with them. Messrs. Charles and C. E. Gibson of St. Louis, acting as "citizens only", under date of December 29, 1896, filed with the Secretary of the Interior a paper "in the nature of an information" making pro-

Erroneous Statements in Judge Tamm's Opinion, 122 F. Supp. 253	Corrections, Plus Comment
Again, at page 259, Judge Tamm states: "Plaintiffs themselves were responsible for the opinions of the Attorneys General . . . ."	test against the patenting of public lands to Railway, a Wisconsin corporation, of lands which the informants claimed had already been appropriated by Congress to the federal corporation for the purposes stated in the statute (13 Stat. 365). The text of this "information" appears at pages 3017 ff. of the JCC Hearings. Mr. Stetson, counsel for respondent Railway, answered the information. The text of his answer appears at pages 3049 ff. of the JCC Hearings. The Secretary of the Interior referred this "information" to the Attorney General, who thereupon issued the opinion now used to petitioners' great prejudice. The statement that President Cleveland's Attorney General had reviewed and rejected petitioners' claims is fiction. Furthermore, the opinion in 25 Ops. A.G. 401 did *not* reject petitioners' claims as unfounded. It merely advised the Secretary of the Interior that he should not entertain "collateral attack" upon the consent foreclosure decree. This Court, in the *Boyd* case, 228 U.S. 482

Erroneous Statements in Judge Tamm's Opinion, 122 F. Supp. 253	Corrections, Plus Comment
	overruled this opinion. That case holds that the decree is subject to collateral attack by a non-party thereto.
	The statement that the plaintiffs themselves were responsible for the opinions of the Attorneys General is not in accordance with the facts. cf. *Southern Pacific R. Co.* v. *Stanley*, Cir. Ct., S. D. Calif., 49 Fed. 263 (1892).
	It should be noted that under date of February 1, 1897, Assistant Attorney General J. H. Leonberger advised the Secretary of the Interior, "Upon careful consideration of the language of the grant to the Northern Pacific *Railroad* Company I do not think it your duty to patent lands to a grantee of that company [i.e. Northern Pacific *Railway* Company]."
	This opinion states that for both substantive legal reasons and administrative reasons the land patents should be issued to the federal corporation notwithstanding Railway's claims to successorship by virtue of the consent foreclosure and its "sundry muniments of title" [i.e. bonds and stocks of the federal corporation; See R. 182, 245].

Erroneous Statements in Judge Tamm's Opinion, 122 F. Supp. 253	Corrections, Plus Comment
(4) "On the issue of fraud, plaintiffs are also confronted with a statement made by their late counsel in a letter of March 29, 1916: " 'That a great wrong has been done them [minority stockholders] has always been believed in, but discovering of the breach of trust and of the perfidy of the fraud perpetrated against them was not had until now, the facts having been most skillfully concealed from government officials, from the court and from the public.[10]' " (122 F. Supp. at 258-9)	(4) The complaint makes no allegations of concealed fraud. Judge Tamm was informed in briefs and on argument that the only fraud issue was respondent's fraud upon the courts. The injection of concealed fraud as one of the elements of the cause of action is a perversion of the well pleaded facts in the complaint. Furthermore, Rule 26(d) of the Rules of Civil Procedure prohibits the use Judge Tamm has made of this so-called Exhibit. It is only a paper caused to be marked for identification by repondent's counsel who never made any attempt to comply with Rule 26(d)(3) governing the use of depositions. We have heretofore pointed out that Judge Tamm failed to rule on petitioners' request to exclude unvouched for papers and that the Court of Appeals denied petitioners' motion to exclude the papers marked for identification on the Lishman deposition. (R. 562, 563).
(5) "Where a plaintiff has been acquiescent while defendant has made great changes and expenditures of money, courts of equity have	(5) (a) Judge McLaughlin on the same complaint previously found that plaintiffs had not been acquiescent (*Landell* v. *Northern Pacific*

"[10] Letter from Joseph P. McCullen, counsel for the committee, to Francis Lynde Stetson, attorney for the defendant Railway. Lishman Deposition, p. 180, exhibit 100."

Erroneous Statements in Judge Tamm's Opinion, 122 F. Supp. 253	Corrections, Plus Comment
always refused to give relief. *Hays* v. *Port of Seattle*, 251 U.S. 233, 40 S. Ct. 125, 64 L. Ed. 243; *Patterson* v. *Hewitt*, 195 U.S. 309, 25 S. Ct. 35, 49 L. Ed. 214." (122 F. Supp. at 259).	*Railway Co.*, 98 F. Supp. at p. 481-2). (b) The answer does not plead acquiescence. There is no allegation in the answer or claim in the record that respondent has ever made any expenditures or changed its position because of reliance upon petitioners' acquiescence. The record contains testimony of respondent's vice president in 1926 before a Committee of Congress that respondent "always" conducted its affairs with reference to the rights of the minority stockholders in the federal corporation. This was never disputed but admitted (R. 261). The record also contains evidence confirming the vice president's testimony. (c) Respondent in its reply brief in the District Court *disavowed* the defense of acquiescence: "While we do not concede the point, we do not now argue that plaintiffs have 'acquiesced'. Our position is that their long-continued delay results in their claims being barred even though the Railway Company knew of their objections." (Transcript 1063). This position is, of

Erroneous Statements in Judge Tamm's Opinion, 122 F. Supp. 253	Corrections, Plus Comment
	course, squarely contrary to all precedents in the field of laches—namely, that *long-continued delay alone does not constitute laches.*
(6) "Granting the relief prayed for by the plaintiffs would create a concentric chaos affecting the rights and equities of thousands of stockholders and creditors, most of which were not even in existence at the time of the alleged fraud." (122 F. Supp. at 259).	(6) (a) This is contrary to the well pleaded allegations in the complaint. The complaint alleges: "As shown hereinafter, defendant from 1896 to date has planned and conducted its business and mortgage financing in a manner so as to keep itself in a position of ability to transfer and convey the railroad of Northern Pacific Railroad Company it purportedly acquired in the years 1896 to 1899 back to the said federal corporation now dominated and controlled by it." (R. 5) The complaint alleges unusual escape clause provisions in all of respondent's mortgages permitting it with a minimum of complication to transfer the railroad back to the federal corporation. (R. 42-43). (b) There is no proof in the record of any harm to innocent purchasers if the court should award petitioners their 3% pro rata share of the benefits accruing from respondent's daily use of the

Erroneous Statements in Judge Tamm's Opinion, 122 F. Supp. 253	Corrections, Plus Comment
	operating franchise, powers and privileges of the federal corporation. (See Frank: Some Realistic Reflections on Some Aspects of Corporate Reorganization," 19 Va. L. Rev. 541, 543).

In its brief before the Court of Appeals and again in its brief in this Court, respondent undertook to restate the question on appeal. This restatement misinformed both Courts as to the basic facts. Respondent incorrectly stated that petitioners or their predecessors had refused an offer to participate on equal terms with all the other stockholders in the 1896 reorganization.*

We submit that it is not good judicial administration to have the important public and private questions inherent in this case disposed of by means of a per curiam Court of Appeals decision based upon a District Court opinion granting summary judgment and containing errors of material fact detrimental to petitioners, and based also upon a misstatement of material facts contained in respondent's briefs before both this Court and the Court of Appeals.

III.

That the matter involved is one of great public interest is manifest from the statutory requirement that the federal corporation shall operate and maintain a *continuous* railroad between Lake Superior and Puget

* The factual incorrectness of this assertion was called to this Court's attention by communication dated September 28, 1955 from petitioners' counsel to the Clerk of this Court. See also page 5 of Appendix D to the petition for certiorari herein.

Sound. Because of this fundamental public interest the statute prohibits any mortgage of the railroad, *as distinguished from the land grant*, without the consent of Congress.

Respondent in its answer asserts the right to mortgage the railroad, notwithstanding this statutory prohibition (R. 104).

The decisions below sanction the novel and preposterous legal doctrine that selective obedience to some provisions in an operative statute can justify present and continuing violation of the other terms therein, provided the violation has been persisted in over a sufficient period of time.

This Court has expounded the doctrine that this particular railroad must not be subjected to the divisive impacts of the laws of the seven States through which it passes and that the federal corporation is the instrumentality established by Congress to accomplish the continuing, national purposes expressed in the statute. *Roberts* v. *Northern Pacific Railroad Co.*, 158 U.S. 1 (1895).

The decision below ignores both the statute and the decision in the *Roberts* case. It lends its aid to cripple and defeat the plain terms of a statute enacted in the public interest. See *Anderson* v. *Abbott*, 321 U.S. 349, 366-7 (1944).

IV.

Denial of certiorari leaves intolerable confusion in the law, both as respects the assignability of railroad franchises and the fiduciary relationship of a majority to a minority stockholder.

It is contrary to the decision in *Northern Pacific Railway Company* v. *Boyd*, 228 U.S. 482 (1913), that

the consent decrees relied upon as a basis for respondent's right of succession are void as against non-parties to the proceedings. It is also contrary to *International Life Insurance Co.* v. *Sherman*, 262 U.S. 346 (1923) and to *Southern Pacific Co.* v. *Bogert*, 250 U.S. 483 (1919).

Congress has refused to repeal the statute. Congress has also refused to substitute respondent as the necessary federal instrumentality under the statute.

Congress has refused to dissolve the federal corporation. Had it done so, remedial provision would have had to be made for the minority stockholders whom Congress had invited to invest and whom it had constituted members of a continuing federal body politic and corporate. See *Munn* v. *Illinois*, 94 U.S. 113, 124.

Yet the decision herein is a judicial repeal of the statute so far as the minority are concerned.

Respondent's own perceptiveness of the true state of the matter—namely that the present rightful owner of the franchise and tax exemption privilege is the federal corporation—is manifested by the fact that since the decision it has held stockholders' meetings of the federal corporation.

The decision, however, makes minority attendance at these meetings a meaningless formality. When respondent, as 97% stockholder, elects and uses the management of the federal corporation to execute necessary title and other papers and to use the federal corporation's railroad franchise and tax exemption privilege, the minority can make no effective complaint. Their stock certificates, according to the decision, are like tickets to a performance at which the minority

are merely members of the audience. The concept of the fiduciary relationship of a majority to a minority stockholder has been made meaningless.

A few practical questions will emphasize the injustice and the confusion thrice confounded created by the present most novel decision.

Suppose Congress should reconsider and dissolve the federal corporation and provide that its operating franchises and federally granted powers and privileges be transferred to respondent—will respondent's 97% stock interest permit it to take everything to the exclusion of the minority 3%?

Suppose Congress should require that the operating franchise, powers and privileges be transferred back to the existing federal corporation—will the 3% minority be entitled to anything?

Suppose the Attorney General of the United States or one of the seven States traversed by the railroad should bring effective *quo warranto* proceedings and drive respondent back into the federal corporation—what happens to the 3% minority?

Respondent's Wisconsin charter is a special act apparently prohibited by the Constitution of that State. See *Attorney General* v. *Superior and St. Croix Railroad Company*, 93 Wisc. 604, 67 N.W. 1138 (1896).

The privilege of tax exemption on the railroad right of way granted by Congress to the federal corporation does not run with the land. It is personal to the grantee and cannot be transferred by act of the parties or by decree of the court. *Chesapeake & Ohio Ry.* v. *Miller*, 114 U.S. 176 (1885).

Suppose respondent, to protect itself against its charter infirmity or to keep the tax exemption privilege, should exercise its discretionary right, reserved in all its mortgages, and transfer the main line of railroad back to the federal corporation—does the decision mean that the 3% federal corporation minority stock would be barred from any participation?

Does the decision nullify the provision in the 1896 foreclosure decree, and in the conveyances to respondent thereunder, which reserves and keeps open the question whether the foreclosure of the main line of railroad was void because the mortgage thereof had not been consented to by Congress as required by the statute?

This Court, in the interests of justice and of good judicial administration, should reconsider its denial of the petition for certiorari.

Respectfully submitted,

ROBERT W. LISHMAN,
EDWARD BROWN WILLIAMS,
Attorneys for Petitioners.

Of Counsel:
FOWLER, LEVA, HAWES & SYMINGTON.

October 1955.

I hereby certify that the foregoing petition is presented in good faith and not for delay, and states grounds of substantial or controlling effect shown by intervening circumstances, (misstatement of material fact in respondent's brief filed in this Court) and states other substantial grounds available to petitioner although not previously presented.

EDWARD BROWN WILLIAMS